



THE INDIAN LAW REPORTS, BOMBAY SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT BOMBAY, AND BY THE
JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON
APPEAL FROM THAT COURT.

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TABLE OF CASES REPORTED.

(I. L. R., 28 Bombay.)

PRIVY COUNCIL.

	Page		Page
Bombay Tramway Company v. The Municipal Corporation of Bombay ...	502	Turner v. Goolam Mahomed ...	573

ORIGINAL CIVIL.

	Page		Page
Ahmed Moosa v. The Municipal Commissioner of Bombay ...	253	Haji Ismail v. The Municipal Commissioner of Bombay ...	253
Bullock, <i>In re</i> ...	647	Ochavaram v. Dolatram ...	644
Haji Hassam v. Nur Mahomed ...	643	Sassoon v. Tokersey ...	616
		Sonaluxmi v. Vishnuprasad ...	597

APPELLATE CIVIL.

	Page		Page
Abaji Sitaram v. The Trimbak Municipality ...	66	Govind v. Dada ...	416
Abdul Ali v. Mirja Khan ...	8	— v. Lakshman ...	74
Achratlal v. The Ahmedabad Municipality ...	340	— v. Sakharam ...	383
Ahmedbhai v. Framji Edulji ...	226	Guruvayya v. Dattatraya ...	11
Anandibai v. Kashibai ...	461	Hansraj Lakshmidas v. Lalji Anandji ...	447
Antone v. Administrator General of Bombay ...	529	Hari v. Ramji ...	371
Appaji v. The Secretary of State for India ...	435	— v. Vishnu ...	349
Babajirav v. Laxmandas ...	215	Hassanbhai v. Umaji ...	153
Bai Kashi v. Parbhu Keval ...	119	Ishwar Lingo v. Gopal Jivaji ...	102
Bhagechand v. Radhakisan ...	62	Jamna v. Jaga Bhana ...	262
Bhagwantappa v. Vishwanath ...	378	Jethabhai v. Nathabhai ...	399
Chamanlal v. Ganesh Motichand ...	453	Jethalal Hirachand v. Lalbhai Dalpatbhai ...	298
Chudasama Sursangji v. Partapsang Khengarji ...	209	Krishnaji v. Anant ...	241
Dagdu v. Bhana ...	420	— v. Hari ...	635
Dalsukhran v. Charles DeBretton ...	326	Kunj Biharji v. Keshavlal Hirajal ...	567
Dattaram v. Vinayak ...	181	Lakshmgavda v. Keshav Ananaji ...	305
Daudbhai Musabhai v. Emnabai ...	235	Lakshman v. Govind ...	74
Dayaram v. Govardhandas ...	458	— v. Vinayak ...	52
Dhanjibhai Girdharbhai v. Mathurbhai Ghelabhai ...	287	Lalchand v. Lakshman ...	466
Fardunji Edalji v. Jamsetji Edalji ...	1	Mahadeo Gangadhar, <i>Ex parte</i> ...	344
Ghulappa v. Raghavendra ...	338	Malukchand v. Manilal ...	364
Gopal Daji v. Gopal bin Sonu ...	248	Manilal Umedram v. Nanabhai Maneklal ...	264
Gopilal v. Agarsingji ...	626	Moholal v. Bai Jivakore ...	472
		Municipal Officer, Aden, v. Abdul Karim ...	292
		Nanchand v. Yenawa ...	630
		Narayan v. Nathaji ...	201

APPELLATE CIVIL—*continued.*

	Page		Page
Narayan v. Raoji	393	Rudrapa v. Irava	82
— v. Venkatacharya	408	Sakharam v. The Secretary of State for India in Council	392
Narsingdas v. Rahimanbai	440	Sakubai v. Ganpat	451
Navroji Manekji Wadia v. Dastur Kharsedji Mancherji	20	Samal v. Babaji	361
Ngawa v. Ramappa	94	Sambhu Dhanaji v. Ram Vithu	244
Pandurang Balaji v. Krishnaji Govind	125	Sayakkhan v. B. S. Davies	198
Purshottam v. Balkrishna	238	Secretary of State for India (The) v. Balvant Ganesh	105
— v. Sagaji	87		
Richand v. Naran	310	Haibatrao Hari	276
Rajaram bin Namdev v. Nathaji Dur- gaji	201	Shankarrao v. Ramji	58
Ramchandra v. Krishnaji	4	Shidlingappa v. Shankarappa	176
— v. Vinayak	181	Shivabhajan v. The Secretary of State for India	314
Rampyarabai v. Balaji Shridhar	294	Sonu v. Dhondu	330
Ranchod Shamji v. Abdulabhai Mitha- bhai	428	Tukaram v. Hari	601
Rangnath Sakharam v. Govind Nar- sinv	639	Vinayak v. Lakshman	92
		Virbhadrappa v. Bhimaji	452

APPELLATE CRIMINAL.

	Page		Page
Emperor v. Alloomiya Husan	129	Emperor v. Kondiba	412
— v. Bal Gangadhar Tilak	479	— v. Maganlal Dulabhai	346
— v. Bankatram Lachiram	533		

TABLE OF CASES CITED.

A

						Page
Abdul v. Chunia Kuar	...	...	...	(1886) 8 All., 377	...	380
— v. Dautre	...	...	...	(1889) 12 Mad., 250	...	532
— v. Jew Narain Mahto	...	...	...	(1888) 16 Cal., 233	...	232
— v. Mahomed	...	...	...	(1890) 15 Mad., 15	...	336, 570
— v. W. J. Albyn	...	...	...	(1903) 30 Cal., 713	...	200
Abrath v. North Eastern Railway Company.	...	...	...	(1883) 11 Q. B. D., 440	...	229
Adams v. The London and Blackwall Railway Company	...	...	...	(1850) 2 Mac. & G., 118	...	512
Adveppa v. Ahmed Saheb	...	...	...	(1891) P. J., p. 40	...	384
Advocate-General of Bombay v. David Haim.	...	...	...	(1886) 11 Bom., 185	...	32
Aiyyagari v. Aiyyagari	...	...	...	(1902) 25 Mad., 690	...	206
Alagappa v. Vellian	...	...	...	(1894) 18 Mad., 33	...	19
Ali Sha v. Husain Bakhsh	...	...	...	(1878) 1 All., 588	...	381
Alla Bakhsh v. Madho Ram	...	...	...	(1900) 23 All., 22	...	157
Allison v. Frisby	...	...	...	(1889) 43 Ch. D., 106	...	250
Amava v. Mahadgauda	...	...	...	(1896) 22 Bom., 416	...	462
Amrit Ram v. Dasrat Ram	...	...	...	(1894) 17 All., 21	...	289
Anandrao v. Daolat Rao	...	...	...	(1888) P. J., p. 361	...	433
Anantharaman v. Ramasami	...	...	...	(1888) 11 Mad., 317	...	531
Angamnthu Pillai v. Kolandavelu Pillai	...	...	...	(1899) 23 Mad., 190	...	16
Annaji v. Daji	...	...	...	(1889) P. J., p. 161	...	606
Annamalai v. Colonel J. G. Cloete	...	...	...	(1883) 6 Mad., 189	...	10
Anundo Moyee Dossee v. Dhonendro Chunder.	...	...	...	(1871) 14 Mos. I. A., 101	...	169
Apaji Narhar v. Ramchandra	...	...	...	(1891) 16 Bom., 29	...	213
Appa v. Bahirji	...	...	...	(1875) P. J., p. 362	...	357
Arbuckle v. Taylor	...	...	...	(1815) 3 Dow., 160	...	229
Arrospe v. Barr	...	...	...	(1881) 8 Court of Sessions Cases (4th series), 602	...	583
Arunachala v. Vythialinga	...	...	...	(1882) 6 Mad., 27	...	19
Arunmoyi Dasi v. Mohendra Nath Wadadar	...	...	...	(1893) 20 Cal., 888	...	646
Ashrof Ali v. The Empress	...	...	...	(1879) 5 Cal., 281	...	230
Ayyavayyar v. Rahimansa	...	...	...	(1890) 14 Mad., 170	...	158

B

Baboo Koolodeep v. Mahadev Sing	...	...	...	(1866) 6 W. R. (Civ. Rul.), 199	...	309
Baburav v. Lala	...	...	...	(1889) P. J., p. 331	...	296
Bachubai v. Shamji Jadowji	...	...	...	(1885) 9 Bom., 536	...	97
Bai Shri Majirajbai v. Narotam Hargovan	...	...	...	(1889) 13 Bom., 672	...	246
Baid Nath Das v. Shamanand Das	...	...	...	(1894) 22 Cal., 143	...	631
Bailey v. Barnes	...	...	...	(1894) 1 Ch., 25	...	195
Baird v. Williamson	...	...	...	(1863) 15 C. B. (N. S.), 376	...	476
Balaram v. Sham Sunder	...	...	...	(1896) 23 Cal., 526	...	237
Balchand v. Balaram	...	...	...	(1903) 5 Bom. L. R., 398	...	246
Baldeo v. Harrison	...	...	...	(1890) All. Weekly Notes, 245	...	420
— v. Jaggu Ram	...	...	...	(1900) 23 All., 1	...	157
Bamford v. Turnley	...	...	...	(1862) 3 B. & S., 62	...	475
Bank of Bengal v. Vyabhoj Gangji	...	...	...	(1891) 16 Bom., 618	...	391
Bapu v. Mahadaji	...	...	...	(1893) 18 Bom., 348	...	612

TABLE OF CASES CITED.

			Page
Barot Parshotam v. Bai Muli	...	(1893) 18 Bom., 749	642
Barwick v. English Joint Stock Bank	...	(1867) L. R., 2 Ex., 259	317
Basapa v. Lakshmapa	...	(1877) P. J., p. 58	615
Batten v. Gedye	...	(1889) 41 Ch. D., 507	32
Beauchamp (Earl of) v. Winu	...	(1878) L. R. 6 & H. L., 225	192
Behary Lall v. Juggo Mohun	...	(1878) 4 Cal., 1	645
Beman v. Rufford	...	(1851) 1 Sim. N. S., 550	510
Bhagchand v. Radhakisan	...	(1903) 28 Bom., 62	313, 384
Bhagirthibai v. Kahunjirav	...	(1886) 11 Bom., 285	85
Bhagvandas Kishordas v. Abdul Husein	...	(1878) 3 Bom., 49	272
Bhawoo Jivaji v. Mulji Dayal	...	(1888) 12 Bom., 377	549
Bhugoo Rae v. Azim Alli Khan	...	(1858) Sud. Dawani Adt., 84	308
Bithoo Begbee v. Keshul Chunder	...	(1848) 9 W. R., 462	271
Biggs v. Hoddinott	...	(1898) 2 Ch., 307	374
Birj Nath v. Chandar Mohan	...	(1897) 19 All., 458	646
Biru v. Khandu	...	(1879) 4 Bom., 214	86
Blackett v. Bates	...	(1865) 1 Ch. App., 117	3
Borough of Bathurst v. Macpherson	...	(1879) 4 App. Cas., 256	342
British Mutual Banking Company v. Charn-	...	(1887) 18 Q. B. D., 714	317
wood Forest Railway Company	...	(1863) 9 Jur. (N. S.), 885	361
Broad v. Selfe	...	(1902) 2 K. B., 743	348
Brooks v. Mason	...	(1861) 30 L. J. Ex., 75	233
Busst v. Gibbons	...		

C

Carlill v. Carbolic Smoke Ball Company	...	(1892) 2 Q. B., 484	621
Carr <i>Ex parte. In re</i> Hofmann	...	(1879) 11 Ch. D., 62	188
Casborne v. Scarfe	...	2 White & Tudor's L. C., 6 (7th ed.)	165
Chadwick v. Trower	...	(1839) 8 L. J. Exch., 286	474
Chilton v. Corporation of London	...	(1878) 4 Ch. D., 735	32
Chinna Seetayya v. Krishnavanamma	...	(1896) 19 Mad., 435	239
Chinto v. Vishnu	...	(1883) P. J., p. 131	220, 606
Chogalal v. Trueman	...	(1883) 7 Bom., 431	380
Cholmondeley v. Clinton	...	(1821) 4 Bligh N. S., 100	92
Christie v. Lewis	...	(1821) 2 Broad and Bing., 410	586
Clarke v. Postan	...	(1834) 6 C. & P., 423	230
Cockrill v. Sparkes	...	(1868) 1 H. & C., 699	251
Collector of Broach v. Desai Raghunath	...	(1883) 7 Bom., 546	406
Colvin v. Newberry	...	(1832) 1 Cl. & Fin., 283	594
Condon <i>In re</i>	...	(1874) L. R. 9 Ch. 609	191
Cooper v. Phibbs	...	(1867) L. R. 2 H. L., 149	193
Corbett v. Hill	...	(1870) L. R. 9. Eq., 671	431
Corporation of the Town of Calcutta v.	...		
Anderson	...	(1884) 10 Cal., 445	342
Cotton v. James	...	(1830) 1 B. & Ad., 128	230
Cowley v. The New Market Local Board	...	(1892) A. C., 345	343

D

Dadoba v. Damodar	...	(1891) 16 Bom., 436	158
Dala v. Parag Khushal	...	(1902) 4 Bom. L. R., 797	402
Dalsukhram v. Charles DeBretten	...	(1904) 28 Bom., 326; 6 Bom. L. R., 73	641
Damodar v. Naro Mahadev	...	(1881) 6 Bom., 11	156
v. Sonaji	...	(1903) 27 Bom., 622	419
Dandekar v. Dandekars	...	(1882) 6 Bom., 663	290

TABLE OF CASES CITED.

vii

	Page
Daniell v. Sinclair (1881) 6 App. Cas., 181	192
Dattagiri v. Dattatraya (1902) 27 Bom., 369; 4 Bom. L. R., 748	223
Davlatasing v. Pandu (1884) 9 Bom., 176	64
Debendra Narain Roy v. Ramtaram Banerjee. (1903) 30 Cal., 599	154
Delaurier and Company v. Wyllie (1889) 17 Court of Sessions Case (4th series), 167	589
Desai Lallubhai Jethabhai v. Mundas Kuber-das (1895) 20 Bom., 390	155
Dev Gopal v. Vasudev (1887) 12 Bom., 371	239
Dhackerjee Dadaji v. The East India Company. (1843) 2 Morley's Digest, 307	324
Dhanram v. Ganpat (1902) 27 Bom., 96; 4 Bom. L. R., 872	64
Dick v. Dhunji Jaitha (1901) 25 Bom., 378; 3 Bom. L. R., 234	385
Dickenson v. Brown and others (1794) 1 Peak N. P., 307	137
Dildar v. Mujeeddunnissa (1878) 4 Cal., 629	419
Doe d. Higgs v. Terry (1885) 4 Ad. & E., 274	32
Howard v. Pestonji (1852) Perry's O. C., 535	31
Doss v. The Secretary of State for India in Council. (1875) L. R., 19 Eq., 509	318
Duchess of Kingston's case (1776) 2 Sm. L. C. (11th edn.), 31.	224
Dukhi Mullah v. Halway (1895) 23 Cal., 55	142
Duliehand v. Dhondi (1880) 5 Bom., 184	638

E

Earl Beauchamp v. Winn (1873) L. R. 6 H. L., 225	192
Edgington v. Fitzmaurice (1885) 29 Ch. D., 459	548
Edinburgh Street Tramways Company v. Lord Provost, &c., of Edinburgh. (1894) A. C., 456	510
Edwards, <i>Ex parte</i> (1871) L. R., 12 Eq., 389	512
Ellappa v. Annamalai (1883) 7 Mad., 76	264
Ellis v. Abrahams (1846) 8 A. & E. (N. S.), 709	232
Emery v. Nolloth (1903) 2 K. B., 264	348
Empress v. Bharmia (1895) 6 Bom. L. R., 258	415
— v. M. J. Vyapoory Moodeliar (1881) 6 Cal., 655	146
— v. Naba Kumar Patnaik (1897) 1 Cal. W. N., 146	135
— v. Salik Roy (1881) 6 Cal., 582	230

F

Faizuddin Ali Khan v. Tincowri Saha (1895) 22 Cal., 695	462
Fakera v. Bibi Azimunnissa (1899) 27 Cal., 540	15
Fakirapa v. Rudrapa (1891) 16 Bom., 119	97
Falck v. Williams (1900) A. C., 176	520
Farasram v. Bhimbhai (1903) 5 Bom. L. R., 195	520
Fateh Chand v. Muhammad Baksh (1894) 16 All., 259	631
Fife v. Clayton (1807) 13 Ves., 546	426
Fink v. Maharaj Bahadoor Sing (1899) 26 Cal., 772	239
Forbes v. Meer Mahomed Tuquee (1870) 13 Moo. I. A., 438	308
Forester v. The Secretary of State for India. (1872) L. R. I. A. Sup. Vol. pp. 13, 17.	317
Foster v. Colby (1858) 28 L. J. Exch., 81	586
— v. Mackinnon (1869) L. R. 4 C. P., 711	427
Frisby <i>In re</i> (1889) 43 Ch. D., 106	250
Fry v. The Chartered Mercantile Bank of India. (1866) L. R. 1 C. P., 689	594

G

	Page
Gadadhar Bhat <i>v.</i> Chandrabhagabai ...	(1892) 17 Bom., 690 ... 457
Gajpathi Rau <i>v.</i> Narsing Rau ...	(1871) 6 Mad. H. C. R., 85 ... 233
Galloway <i>v.</i> Mayor and Commonalty of London	(1866) L. R. 1 H. L., 34 ... 509
Ganesl. <i>v.</i> Ganpat ...	(1895) P. J., p. 56 ... 615
— <i>v.</i> Vaghu ...	(1903) 27 Bom., 610; 5 Bom. L. R., 581 ... 84
Ganga Din <i>v.</i> Khushali ...	(1885) 7 All., 702 ... 269
Ganga Pershad Sahu <i>v.</i> The Land Mortgage Bank.	(1893) 21 Cal., 366 ... 377
Ganoji <i>v.</i> Dhoundu ...	(1890) 14 Bom., 450 ... 239
Gardner <i>v.</i> London Chatham and Dover Railway Company.	(1866-67) L. R. 2 Ch., 201 ... 510
— <i>v.</i> Trechmann ...	(1884) 15 Q. B. D., 154 ... 594
Gavdappa <i>v.</i> Girimallappa ...	(1894) 19 Bom., 331 ... 464
George Whitechurch, Limited, <i>v.</i> Cavanagh ...	(1902) A. C., 117 ... 407
Ghela Icharam <i>v.</i> Sankalchand ...	(1893) 18 Bom., 597 ... 339
Girdharee Lall <i>v.</i> Kantoo Lall ...	(1874) L. R. 1 I. A., 321 ... 389
Gledstones <i>v.</i> Allen ...	(1852) 12 C. B., 202 ... 590
Gnanasambanda Pandara <i>v.</i> Velu Pandaram ...	(1899) L. R. 27 I. A., 69 ... 223
Gobind <i>v.</i> Jagadamba Debia ...	(1868) 3 Ben. L. R. P. C., 25 ... 6
Goddard <i>v.</i> Hodges ...	(1832) 1 C. & M., 33 ... 179
Gokul Pershad <i>v.</i> Etwaree Mahto ...	(1873) 20 W. R., 138 ... 16
Goodson <i>v.</i> Richardson ...	(1874) L. R. 9 Ch., 221 ... 303
Gopal Dai <i>v.</i> Chuni Lal ...	(1885) 8 All., 67 ... 269
Govind <i>v.</i> Sadashiv Bharna Shet ...	(1892) 17 Bom., 771 ... 301
Grant <i>v.</i> The Secretary of State for India in Council.	(1877) 2 C. P. D., 445 ... 318
Great Northern Railway Company <i>v.</i> The Eastern Counties Railway Company.	(1851) 9 Hare 306 ... 510
Gridhari Lall Roy <i>v.</i> The Bengal Government.	(1868) 12 Moo. I. A., 448 ... 233
Grish Chunder Sasmal <i>v.</i> Dwarka Nath Dinda.	(1897) 24 Cal., 640 ... 20
Gulabhai <i>v.</i> Kasanji ...	(1897) P. J., p. 246 ... 604
Gulabchand <i>v.</i> Moti ...	(1900) 25 Bom., 523 ... 122, 345
Guracharya <i>v.</i> Svamirayacharya ...	(1879) 3 Bom., 431 ... 645
Gurlingapa <i>v.</i> Nandapa ...	(1896) 21 Bom., 797 ... 206
Gurupadapa <i>v.</i> Irapa ...	(1890) 14 Bom., 558 ... 128

H

Hadjee Ismail <i>v.</i> Hadjee Mahomed ...	(1874) 13 Ben. L. R., 91 ... 293
Hajarimal <i>v.</i> Krishnarav ...	(1881) 5 Bom., 647 ... 252
Haji Musa <i>v.</i> Purmanand Nursey ...	(1890) 15 Bom., 216 ... 380
Hall <i>v.</i> Venkata Krishna ...	(1889) 13 Mad., 394 ... 229
Hamlyn <i>v.</i> John Houston & Co. ...	(1903) 1 K. B., 81 ... 220
Hampden <i>v.</i> Walsh ...	(1876) 1 Q. B. D., 189 ... 621
Hansen <i>v.</i> Harrold Brothers ...	(1894) 1 Q. B., 612; 63 L. J. Q. B., 741 ... 589
Harakchand <i>v.</i> Totaram ...	(1889) P. J., p. 377 ... 324
Harmoni Dassi <i>v.</i> Hari Churu Chowdhry ...	(1895) 22 Cal., 833 ... 97
Hargovandas <i>v.</i> Bajibhai ...	(1899) 14 Bom., 222 ... 641
Hari <i>v.</i> Balambhat ...	(1884) 9 Bom., 233 ... 351
— <i>v.</i> Gokaldas ...	(1887) 12 Bom., 153 ... 16
— <i>v.</i> Mahadu Dad Gayda ...	(1895) 20 Bom., 435 ... 16
— <i>v.</i> Yamunabai ...	(1897) 23 Bom., 35 ... 419
Hari Bhanji <i>v.</i> The Secretary of State for India	(1879) 4 Mad., 344 ... 317

TABLE OF CASES CITED.

ix

	Page
Hari Kamayya v. Hari Venkayya (1903) 26 Mad., 212...	245
Harris v. DePinna (1836) 33 Ch. D., 238 ...	431
Harrod v. Worship (1861) 30 L. J. M. C., 165...	114
Harvey v. Walters (1872) L. R., 8 C. P., 162 ...	431
Haynes v. Haynes (1861) 1 Drew & Sm., 426...	512
Haywood v. Brunswick Building Society ... (1881) 8 Q. B. D., 403 ...	590
Heath v. Pugh (1881) 6 Q. B. D., 345 ...	166
Heera Nema v. Pestonji (1828) 22 Bom., 693 ...	64, 318
Henley v. The Mayor and Burjesses of Lyme... (1828) 5 Bing., 91 ...	342
Henton v. Paddison (1893) 68 L. T., 405 ...	251
Hirjibhai v. Jamsetji (1890) P. J., p. 250 ...	291
Hofmann, <i>In re</i> (1879) 11 Ch. D., 62 ...	182
Hollingham v. Heath (1858) 27 L. J. C. P., 241 ...	146
Hormusji Navroji v. Bai Dhanbaiji (1887) 12 Bom., 164 ...	645

I

Ibrahimbhai v. Fletcher (1896) 21 Bom., 827 ...	157
Imdad Ali v. Jagan Lal (1895) 17 All., 478 ...	360
Imperatrix v. Lakshman Sakhamam (1877) 2 Bom., 431 ...	234

J

Jadhoji v. Rajoo (1899) 1 Bom. L. R., 112 ...	644
Jag Lal v. Har Narain Singh (1888) 10 All., 524 ...	237
Jagabhai v. Bhukandas (1886) 11 Bom., 37 ...	389
James, <i>Ex parte</i> (1874) L. R. 9 Ch., 609 ...	191
Janabai v. Appaya (1898) P. J., p. 234 ...	221
Jodraj v. Dinkar Sakhamam (not reported) ...	644
Jogendra v. Brojendra (1896) 23 Cal., 731 ...	220
Johnson v. Bland 2 Burr., 1086 ...	8
Jones v. Ledgard (1886) 8 All., 340 ...	289
Joosub Haji v. N. W. Kemp (1902) 26 Bom., 809 ...	532
Joshi Baishankar v. Bai Parvati (1901) 26 Bom., 246 ...	268
Jugaldas v. Ambashankar (1888) 12 Bom., 501 ...	640
Juggodumba v. Puddomoney (1875) 15 Beng. L. R., 318 ...	223
Julessur Kooer v. Uggur Roy (1882) 9 Cal., 725 ...	84

K

Kali Kanta Surma v. Gouri Prosad Surma ... (1890) 17 Cal., 906 ...	214
Kalidas v. Nathu Bhagvan (1883) 7 Bom., 217 ...	15
Kanara v. Govind (1892) 16 Mad., 214 ...	103
Kanchan Modi v. Baij Nath Singh (1892) 19 Cal., 336 ...	631
Karalia v. Mansukhram (1900) 24 Bom., 400 ...	468
Kasandas v. Pranjivan (1870) 7 Bom. H. C. R. (A. C. J.), 146 ...	132
Kashinath Das v. Sadashiv Patnaik (1893) 20 Cal., 805 ...	156
Keir v. Leeman (1844) 6 Q. B., 308 ...	641
Kelly v. Mid. G. W. Ry. Co. (1872) 7 Ir. R. C. L., 8 ...	233
Kendall v. Hamilton (1879) 4 App. Cas., 504 ...	385
Kern v. Deslandes (1861) 10 C. B. N. S., 205; 30 L. J. C. P., 297 ...	500
Keshab Chunder Roy v. Akhil Motey (1895) 22 Cal., 993 ...	549
Keshav Rankrishna v. Govind Ganesh (1884) 9 Bom., 94 ...	464
Kesu v. Genu (1898) 23 Bom., 502 ...	384
Kewney v. Atrill (1886) 34 Ch. D., 345 ...	180

				Page
King v. Hoare ...	...	...	(1844) 13 M. & W., 494	385
Kinlock v. The Secretary of State for India in Council.	...	...	(1882) 7 App. Cas., 619	322
Kondo v. Babaji ...	...	...	(1881) P. J., p. 337	223
Krishna v. Kesavan ...	...	...	(1897) 20 Mad., 305	641
Krishna Bhupati v. Ramamurti Pantulu ...	...	...	(1894) 18 Mad., 405	570
Krishnaji v. Damodar ...	...	...	(1903) 5 Bom. L. R., 618	239
— v. Maheshvar ...	...	...	(1895) 20 Bom., 346	353
Kulbantia v. Bahadur Hazam ...	...	...	(1899) 3 Cal. W. N., cclxxvii	646
Kunhali Beari v. Keshava Shanbaga ...	...	...	(1887) 11 Mad., 64	390
Kutti Ammal v. Radakristna Aiyar ...	...	...	(1875) 8 Mad. H. C. R., 88	84

L

Lachman Das v. Khunnu Lal ...	...	...	(1896) 19 All., 26	410
Lakshmana v. Sukiya Bai ...	...	...	(1884) 7 Mad., 400	395
Lakshmi v. Dada Nanaji ...	...	...	(1879) 4 Bom., 210	84
Lala Beni Ram v. Kundan Lal ...	...	...	(1899) L. R. 26 I. A., 58	444
Lallubhai v. Mankuvarbai ...	...	...	(1876) 2 Bom., 388	84
Lascelles v. Lord Onslow ...	...	...	(1877) 2 Q. B. D., 433	342
Lawless v. Sullivan ...	...	...	(1881) 6 App. Cas., 373	519
Ledue v. Ward ...	...	...	(1888) 20 Q. B. D., 475	590
Leggott v. G. N. Ry. Company ...	...	...	(1876) 1 Q. B. D., 599	224
Lindo v. Belisario ...	...	...	(1795) 1 Hag. Con., 216	600
Lindsell v. Phillips ...	...	...	(1885) 30 Ch. D., 291	250
Lingammal v. Chinna ...	...	...	(1882) 6 Mad., 239	97
Livesey v. Livesey ...	...	...	(1827) 3 Russ., 287	193
London and South Western Railway Company v. Gomm ...	...	...	(1882) 20 Ch. D., 562	518
London Bombay and Mediterranean Bank v. Mahomed Ibrahim ...	...	...	(1880) 4 Bom., 619	648
Long v. Millar ...	...	...	(1879) 4 C. P. D., 450	514
Lope v. Barve ...	...	...	(1898) P. J., p. 39	363
Lord Rivers v. Adams ...	...	...	(1878) 3 Ex. D., 361	92
Lound v. Grimwade ...	...	...	(1888) 39 Ch. D., 605	641

M

Maddison v. Alderson ...	...	...	(1883) 8 App. Cas., 473	407, 471
Madras Railway Company v. The Zemindar of Carvatenagarum ...	...	...	(1874) L. R. 1 I. A., 364	476
Maganlal v. Shakra ...	...	...	(1897) 22 Bom., 945	155
Mahabir Prasad v. Sital Singh ...	...	...	(1897) 19 All., 520	419
Mahamad Dasu v. Amanji ...	...	...	(1899) 23 Bom., 710	402
Mahant v. Chudasama ...	...	...	(1888) 13 Bom., 106	104
Maharane Shibessourcee Debia v. Mothoora-nath Acharjo ...	...	...	(1869) 13 Moo. I. A., 270	223
Mahomed v. Abdar Rahim ...	...	...	(1899) 26 Cal., 839	631
— v. Hakiman ...	...	...	(1898) 25 Cal., 757	289
Malkarjun v. Narhari ...	...	...	(1900) 25 Bom., 337	123
Manchester Ship Canal Company v. Manchester Race-course Company ...	...	...	(1900) 2 Ch., 352; (1901) 2 Ch., 37.	518
Manohar v. Lakhmiram ...	...	...	(1887) 12 Bom., 247	223
Mansukh v. Tarbhoyan ...	...	...	(1882) P. J., p. 213	155
Marquess of Northampton v. Pollock ...	...	...	(1890) 45 Ch. D., 190	376
Maruti v. Krishna ...	...	...	(1899) 23 Bom., 592; 1 Bom. L. R. 31	104

TABLE OF CASES CITED.

xi

	Page
Mayhew v. Parker (1799) 8 T. R., 110	137
M'Carthy v. Detaix (1831) 2 Russ. & My., 614	193
Mercer v. Whall (1845) 5 Q. B., 447	640
Mersey Docks v. Lucas (1883) 8 App. Cas., 891	519
Metropolitan Asylum District v. Hill (1831) 6 App. Cas., 193	114
Metropolitan Railway Company v. Woodhouse. (1865) 34 L. J. Ch., 297	512
Matters v. Brown (1863) 32 L. J. Ex., 138	224
Milner, <i>Ex parte</i> (1885) 15 Q. B. D., 605	367
Milnes v. Grey (1807) 14 Vesey (Jun.), 400	574
M'kinnon v. Penson (1853) 8 Exch., 319	312
Mohan v. Haku Rupa (1830) 4 Bom., 638	531
— v. Togu (1885) 10 Bom., 224	155
Mohanlal v. Amratlal (1878) 3 Bom., 174	431
Mohori Bibee v. Dharmodas Ghose (1903) 30 Cal., 539; 30 I. A., 114, 189, 397	463
Mondakini Dasi v. Adinath Dey (1890) 13 Cal., 69	385
Motilal v. Ghellabhai (1892) 17 Bom., 6	489
Mulhoo Soodun Sundial v. Suroop Chunder... (1849) 4 Moo. I. A., 431	615
Mudkapa v. Ningapa (1877) P. J., p. 115	380
Muhammad v. Fatima (1889) 11 All., 314	335
— v. Radhe Ram Singh (1900) 23 All., 307	638
Mulchand v. Ravji (1883) P. J., p. 184	84
Mulji v. Cursandas (1900) 24 Bom., 563	259
Municipal Corporation of the City of Toronto v. Virgo. (1896) A. C., 88	343
Municipal Council of Sydney v. Bourke (1895) A. C., 433	343
Municipality of Pictou v. Geldert (1893) A. C., 524	104
Murlidhar v. Parsharam (1900) 25 Bom., 101	296
Musammat Rajeswari Koer v. Bai Bal Krishan. (1887) 14 I. A., 142	462
Mussumat Bhoobun Moyee Debia v. Ram Kishore Acharg. (1856) 10 Moo. I. A., 279	457
Muthusami Mudaliyar v. Simambedu Muthukumaraswami Mudaliyar. (1896) 19 Mad., 405	570
Muttakke v. Thimmappa (1891) 15 Mad., 186	

N

Nanabhai v. Nathabhai (1872) 9 Bom. H. C. R., 89	6
Nandram v. Babaji (1897) 22 Bom., 771	103
Naran v. Dolatram (1832) 6 Bom., 538	156
Narayan v. Anandram (1891) 16 Bom., 480	104
— v. Raoji (1884) P. J., p. 254	353
Narayana v. Shankunni (1891) 15 Mad., 255	350, 570
Narayandas v. Sahab Husein (1888) 12 Bom., 553	627
Narsingrav v. Laxumanrao (1876) 1 Bom., 318	531
Navheri v. Shek Jamal (1903) 5 Bom. L. R., 577	16
Nilakant v. Sures Chunder (1885) L. R. 22 I. A., 171	161
Nireaha Tamaki v. Baker (1901) A. C., 561	325
Noakes & Co., Limited, v. Rice (1902) A. C., 24	353
Nobin Krishna v. Rassick Lall (1884) 10 Cal., 1047	549
Nusservanjee Pestonjee v. Meer Mynoodin Khan. (1855) 6 Moo. I. A., 134	612

O

Oriental Bank Corporation v. J. A. Charriot... (1886) 12 Cal., 642	15
---	----

P

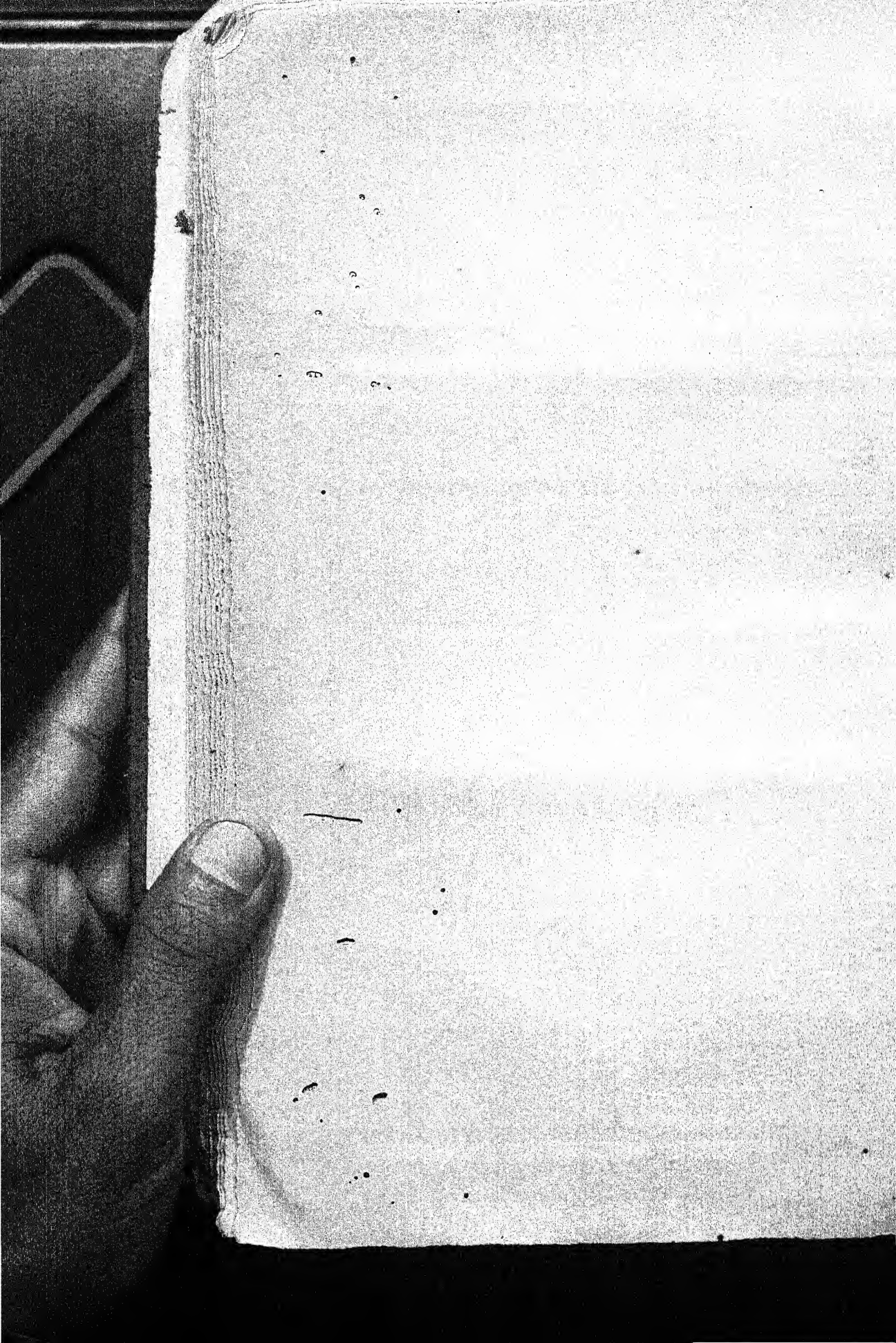
P. & O. Steam Navigation Co. v. The Secretary of State for India. (1861) 5 Bom. H. C. R., Appx., 1... ..	317
--	-----

	Page
Padajiray v. Ramray	(1888) 13 Bom., 160 ... 462
Paget v. Marshall	(1884) 28 Ch. D., 255 ... 426
Pahadadh Singh v. Mussamat Luchmumbutty.	(1869) 12 W. R. (Civ. Rul.), 256... 214
Pandurang v. Bhaskar	(1874) 11 Bom. H. C. R., 72 ... 208
Papireddi v. Narasareddi	(1892) 16 Mad., 464 ... 469
Parbatji Charan v. Panchanand	(1884) 6 All., 243 ... 200
Parshotam v. Rimal	(1895) 20 Bom., 196 ... 156
Payapa v. Appanna	(1898) 23 Bom., 327 ... 462
Peck v. Larsen	(1871) L. R. 12 Eq., 378 ... 588
Penny v. Penny	(1868) L. R. 5 Eq., 227 ... 512
Perumal v. Kaveri	(1892) 16 Mad., 121 ... 154
Popplewell v. Hodgkinson	(1869) L. R. 4 Exch., 248 ... 474
Potter v. Edwards	(1857) 26 L. J. Ch., 468 ... 375
Powell v. Kempton Park Race-course Com- pany.	(1899) A. C., 143 ... 136
Frenchand, <i>In the goods of</i>	(1894) 21 Cal. ... 6
Premji v. Haji Cassum	(1895) 20 Bom., 298 ... 301
Prosonno Moyi Dassi v. Sreenauth Roy	(1894) 21 Cal., 809 ... 269
Pudma Coomari Debi v. The Court of Wards.	(1881) L. R., 8 I. A., 229 ... 463
Paigh v. Heath	(1882) 7 App. Cas., 235 ... 164
Punardeo Narain Singh v. Ram Sarup Roy	(1898) 25 Cal., 858 ... 142
Purshotamdass v. Mahanant Surajbharthi	(1882) 6 Bom., 588 ... 263
Purushottam v. Chatargir	(1900) 25 Bom., 82 ... 220, 604
Q	
Quartz Hill Gold Mining Co. v. Eyre	(1883) 11 Q. B. D., 674 ... 230
Queen v. Bidu Neshyo	(1869) 13 Beng. L. R., 325 (f. n.) ... 554
— v. Inhabitants of Dukinsfield	(1863) 4 B. & S., 158 ... 342
— v. Mahomed Hoomayoon Shaw	(1874) 13 Ben. L. R., 324 ... 553
— v. Mussamat Zameerun	(1866) 6 W. R., 65 (Civ. Rul.) ... 555
— v. Shiboo Mundle	(1865) 3 W. R. Cr., 38 ... 141
— v. Sustiram Mandal	(1873) 21 W. R., 1 (Civ. Rul.) ... 415
Queen-Emprses v. Chagan	(1890) 14 Bom., 331 ... 546
— v. Ghulet	(1884) 7 All., 44 ... 554
— v. Govind	(1891) 16 Bom., 283 ... 145
— v. Kanji Bhimji	(1892) 17 Bom., 184 ... 145
— v. Kartick Chunder Das	(1887) 14 Cal., 721 ... 141
— v. Madhavrao	(1894) 19 Bom., 735 ... 415
— v. Mugapa	(1893) 18 Bom., 377 ... 551
— v. Narottamdas Motiram	(1889) 13 Bom., 681 ... 145
— v. Puran	(1899) All. W. N., 39 ... 555
— v. Ramji	(1885) 10 Bom., 124 ... 554
— v. Shekh Saheb Badrudin	(1883) 8 Bom., 197 ... 549
R	
Rachappa v. Mangesh Mahadaji	(1898) P. J., p. 386 ... 364
Rachava v. Kalisgapa	(1892) 16 Bom., 716 ... 84
Radhabai v. Shamrao	(1881) 8 Bom., 168 ... 155
Rachamoni Debi v. The Collector of Khulna.	(1900) L. R. 27 I. A., 136 ... 161
Raghu Nath v. Mussamat Pate Koer	(1901) 6 Cal. W. N., 345 ... 646
Raj Narair Das v. Shama Nando Das	(1899) 26 Cal., 845 ... 336
Raja Bommadevara Venkata v. Raja Boma- devara.	(1902) L. R. 29 I. A., 76 ... 410
Rajama. Motiram v. Shivaji Anandrao	(1902) 4 Bom. L. R., 966 ... 353
Rajaram v. Ganesh Hari	(1895) 21 Bom., 91 ... 221
Rakhmabai v. Radhabai	(1868) 5 Bom. H. C. R. (A. C. J.), 181 ... 462
Ralli v. Carmalli Fazal	(1890) 14 Bom., 102 ... 433

		Page
Kalli Brothers v. Paddington Steamship Com- pany.	(1900) 5 Commercial Cases, 124...	588
Ram Bakhsh v. Mughlani Khanam ...	(1904) 24 All., W. N., 8 ...	468
Ram Kuar v. Sardar Singh ...	(1898) 20 All. 352 ...	344
Rama v. Martand ...	(1884) 9 Bom., 236 (f. n.) ...	353
Ramasami v. Chinnan Asari ...	(1901) 24 Mad., 449 ...	469
— v. Queen-Empress ...	(1884) 7 Mad., 292 ...	230
Ramchandra v. Bhikibai ...	(1882) 6 Bom., 477 ...	604
— v. Narsinhacharya ...	(1899) 24 Bom., 251 ...	221, 615
Ramji v. Mahomed ...	(1889) 13 Bom., 671; P. J., p. 90.	384
Ramjiwan Mal v. Chand Mal ...	(1888) 10 All., 587 ...	237
Ramkrishna v. Shamrao ...	(1902) 26 Bom., 526 ...	463
Ranee Sonet Kowar v. Mirza Himmvt Bahadoor.	(1876) L. R., 3 L. A., 92 ...	225
Rangasamy Naiken v. Jalli Bodi Naiken ...	(1902) 26 Mad., 484 ...	169
Rango v. Balkrishna Vithal ...	(1887) 12 Bom., 44 ...	200
— v. Bhomshetti ...	(1901) 26 Bom., 121 ...	105
Ratanji v. Sakhamam ...	(1884) P. J., p. 68 ...	94
Ratanlal Rangildas, <i>In re</i> ...	(1892) 17 Bom., 748 ...	325
Ravji v. Dadaji ...	(1875) 1 Bom., 523 ...	281
— v. Krishnaji ...	(1874) 11 Bom. H. C. R., 139 ...	162
— v. Mahadev ...	(1897) 22 Bom., 672 ...	15
Reed v. Taylor ...	(1812) 4 Taun., 616 ...	230
Reg v. Jackson ...	(1823) 1 Lewin C. C., 270 ...	561
Regent's Canal Company v. Ware ...	(1857) 23 Beav., 575 ...	523
Reid v. Richardson ...	(1887) 14 Cal., 361 ...	550
Reynolds v. Jex ...	(1866) 34 L. J. Q. B., 251; 7 B. & S., 86 ...	588
Rodocanachi v. Milburn ...	(1888) 18 Q. B. D., 67 ...	590
Rogers v. Ingham ...	(1876) 3 Ch. D., 351 ...	191
— c. Rajendro Dutt ...	(1860) 8 Moo. I. A., 103 ...	323
Rohima Bye v. Hadjee Mahomed ...	(1874) 13 Beng. L. R., 91 ...	293
Roshun Doosadh v. Empress ...	(1880) 5 Cal., 768 ...	141
Rupa Jagshet v. Krishnaji Govind ...	(1884) 9 Bom., 169 ...	223
Rupchand v. Davlatrav ...	(1882) 6 Bom., 495 ...	167
— v. Rakhmabai ...	(1871) 8 Bom. H. C. R. (A. C. J.), 114 ...	462
Rustom J. Irani v. H. Kennedy ...	(1901) 26 Bom., 396 ...	256
Rustomji v. Sheth Purshotamdas ...	(1901) 25 Bom., 606; 3 Bom. L. R., 227 ...	212
Rylands v. Fletcher ...	(1868) L. R. 3 H. L., 330 ...	474
S		
Sadashiv v. Ramkrishna ...	(1901) 25 Bom., 556 ...	94
Sadashiva Pillai v. Ramalinga Pillai...	(1875) L. R. 2 I. A., 219 ...	395
Sadler v. Nixon ...	(1834) 5 B. & Ad., 936 ...	179
Sakharam v. Hari ...	(1881) 6 Bom., 113 ...	207
— v. The Collector of Thana ...	(1904) 6 Bom. L. R., 124 ...	370
Samal Nathu v. Jaishankar ...	(1884) 9 Bom., 254 ...	291
Sanitary Commissioners of Gibraltar v. Orfila.	(1890) 15 App. Cas., 400 ...	319, 343
Sankana v. Virupakshapa ...	(1883) 7 Bom., 146 ...	156
Santaji v. Ravji ...	(1890) 15 Bom., 105 ...	631
Sarat Chunder Dey v. Gopal Chunder ...	(1892) 20 Cal., 296 ...	395
Sayad Muhammad v. Fatteh Muhammad ...	(1894) L. R. 22 I. A. 4; 22 Cal., 324 ...	161
Scott v. Glasgow Corporation ...	(1899) A. C., 470 ...	260
Secretary of State for India v. Balvant ...	(1892) 17 Bom., 422 ...	80
— v. Hari Bhanji ...	(1882) 5 Mad., 273 ...	317

				Page
Secretary of State in Council of India v. Kamachee Boye Sahaba.	(1859)	7 Moo. I. A., 476	...	318
Sesha v. Seshaya	(1833)	7 Mad., 55	...	264
Seth Chand Mal v. Durga Dei	(1839)	12 All., 313	...	127
Sew Bux Bogla v. Shib Chunder Sen	(1836)	13 Cal., 225	...	269
Sewell v. Burdick	(1834)	10 App. Cas., 74	...	590
Shahabzadee Shahunshah Begum v. Fergusson.	(1831)	7 Cal., 499	...	532
Shafik Abdulla v. Haji Abdulla	(1880)	5 Bom., 8	...	155
Shand v. Sanderson	(1839)	4 H. & N., 381; 28 L. J. Exch., 278	...	582
Shankarapa v. Danapa	(1881)	5 Bom., 604	...	638
Sharp v. Wakefield	(1891)	A. C., 173	...	261
Sheil, <i>Ex parte</i>	(1877)	4 Ch. D., 789	...	355
Sheo Ratan Singh v. Sheosahai Misr	(1884)	6 All., 358	...	339
Sheoraj Rai v. Kashi Nath	(1884)	7 All., 247	...	339
Shillito	(1897)	3 Commercial Cases, 44	...	590
Shirekuli v. Ajjibal	(1890)	15 Bom., 297; P. J., p. 300.	...	15
Shivjiram v. Waman	(1897)	22 Bom., 939	...	363
Shixram v. Genu	(1882)	6 Bom., 515	...	156
Shiwajiram v. Vishnu	(1930)	2 Bom. L. R., 121	...	19
Shringarpure v. S. B. Pethe	(1878)	2 Bom., 662	...	162
Shrinivas v. Gurunath	(1890)	15 Bom., 527	...	240
— v. Hanmant	(1899)	24 Bom., 260	...	607
Shropshire Union Railway and Canal Co. v. The Queen.	(1875)	L. R. 7 H. L., 496	...	195
Sitaram v. Ganpat	(1892)	P. J., p. 261	...	208
Sivaraman Chetti v. Muthaya Chetti	(1838)	12 Mad., 241	...	50
Skyring v. Greenwood	(1825)	4 B. & C., 281	...	192
Small v. Moates	(1833)	9 Beng., 574	...	588
Smith v. Hughes	(1871)	L. R. 6 Q. B., 597	...	426
— v. Kenrick	(1849)	7 C. B., 564	...	476
Snow v. Whitehead	(1834)	27 Ch. D., 528	...	477
Sobhanadri v. Chalamanna	(1843)	17 Mad., 225	...	641
Sorabji v. Govind Ramji	(1891)	16 Bom., 91	...	271
Sri Mahant Govindrao v. Sita Ram Kesho	(1898)	21 All., 53	...	160
Srimant Rajah Yarlagudda v. Makerla Sriddevamma.	(1897)	24 I. A., 73	...	223
Srinivasa Ayyangar v. Seetharamayyar	(1895)	19 Mad., 72	...	271
Srirangachariar v. Ramasami	(1894)	18 Mad., 189	...	641
Steele v. Haddock	(1855)	24 L. G. Ex., 78	...	426
Stockton and Darlington Railway Co. v. Brown.	(1860)	9 H. L. C., 246	...	509
Subbaraya v. Manika	(1896)	19 Mad., 345	...	207
— v. Vythilinga	(1892)	16 Mad., 85	...	366
Subodini Debi v. Cumar Ganoda Kant	(1887)	14 Cal., 400	...	15
Sunbhoolall v. The Collector of Surat	(1859)	8 Moo. I. A., 1	...	281
Sunder Malhar Patel v. Bapuji Shridhar	(1893)	18 Bom., 755	...	353
Suraj Samsi Koer v. Sheo Proshad Singh	(1878-79)	L. R. 6 I. A., 88	...	411
Surjan Raot v. Bhikari Raot	(1893)	21 Cal., 213	...	289
Suryanarayanamurti v. Tamanna	(1901)	25 Mad., 504	...	570
T				
Taniram v. Gajanan	(1899)	24 Bom., 300	...	103
Tara Lal Singh v. Sarobar Singh	(1899)	27 Cal., 407	...	395
Taylor v. Corporation of St. Helens	(1877)	6 Ch. D., 264	...	117
Tejpur v. Mahomed Jamal	(1896)	20 Bom., 596	...	289
Thakoorain Sahiba v. Mohun Lall	(1867)	7 W. R. P. C., 25	...	84

		Page
Tharsis Sulphur and Copper Mining Com- pany v. Culliford.	(1873) 22 W. R. (Eng.), 46	589
The First Assistant Collector of Nasik v. Shanji Dasrath Patil.	(1878) 7 Bom., 209	113
Thomas Eales Rogers v. Rajendro Dutt	(1860) 2 W. R. (P. C.), 51	318
Thompson v. Mayor, &c., of Brighton	(1894) 1 Q. B., 332	343
Thoroughgood's case	(1582) 1 Co. Rep. (Part II), 445	427
Tiruchittambala Chetti v. Seshayyengar	(1881) 4 Mad., 383	272
Tobin v. The Queen	(1864) 33 L. J. C. P., 199	325
Trimalrav v. The Municipal Commissioners of Hubli.	(1878) 3 Bom., 172	468
Tukaram v. Arantbhat	(1900) 25 Bom., 232	64
Tukarambhat v. Gaugaram	(1898) 23 Bom., 454	410
Tyson v. Mayor of London	(1871) L. R. 7 C. P., 18	512
U		
Udaram v. Ranu	(1875) 11 Bom. H. C. R., 76	206
Udit Narain v. Ram Pertab Singh	(1881) All. Weekly Notes, 120	420
Umed Huthising v. Goman Bhaiji	(1895) 20 Bom., 385	389
Umes Chunder v. Zahur Fatima	(1890) 18 Cal., 164	155
Umashankar Lakshmairam v. Chhotalal Vajo- ram.	(1875) 1 Bom., 19	614
Upendra Mohan Ghose v. Gopal Chandra	(1894) 21 Cal., 484	6
V		
Vasanji v. Lallu Akhu	(1885) 9 Bom., 285	128
Vasudev v. Narayan	(1882) P. J., p. 21	174
— v. The Collector of Poona	(1873) 10 Bom. H. C. R., 471	279
Venkappa v. Jivaji	(1900) 25 Bom., 306	464
Venketesh v. Chamapgavda	(1892) 17 Bom., 674	289
Veribhai v. Raghabhai	(1876) 1 Bom., 225	401
Vestry of Bermondsey v. Brown	(1865) 1 Eq. Cases, 204	32
Vijaya Ragava v. Secretary of State for India.	(1884) 7 Mad., 466	318
Vinayak v. Lakshmibai	(1864) 1 Bom. H. C. R., 117	84
Vishnu v. Hur Patel	(1888) 12 Bom., 499	64
Vishvanath v. Virchand	(1881) 6 Bom., 16	271
Vithaldas v. The Municipal Commissioner of Bombay	(1902) 4 Bom. L. R., 914	475
Vithalrao v. Vaghoji	(1892) 17 Bom., 570	380
W		
Wallingford v. Mutual Society	(1880) 5 App. Cas., 685	375
Wardens of Nossa Senora v. Bishop Hart- mann.	(1851) Perry's O. C., 333	32
Wasudev v. Narayan	(1882) P. J., p. 21	155
White v. Hindley Local Board of Health	(1875) L. R. 10 Q. B., 219	342
Wilby v. Elgee	(1875) L. R. 10 C. P., 497	640
Wilkins v. Mayor of Birmingham	(1883) 25 Ch. D., 78	512
William v. Bai Shri Dariaba	(1896) 21 Bom., 771	533
Williams v. Bayley	(1866) L. R. 1 H. L., 200	641
Wilson v. Waddell	(1876) 2 App. Cas., 95	474
Winch v. Birkenhead Lancashire and Cheshire Junction Railway Company	(1852) 5 De G. & Sm., 562	510
Wood v. Waud	(1849) 3 Ex., 748	119
Y		
Yasin v. King Emperor	(1901) 28 Cal., 689	140
Yella Chetti v. Munisami Reddi	(1832) 6 Mad., 101	384
Yeshvant Shenvi v. Vithoba Sheti	(1887) 12 Bom., 231	353



THE
INDIAN LAW REPORTS,
Bombay Series.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

FARDUNJI EDALJI (ORIGINAL DEFENDANT), APPELLANT, v. JAMSEDJI
EDALJI (ORIGINAL PLAINTIFF), RESPONDENT.*

1903.

July 21.

*Specific Relief Act (I of 1877), sections 21 and 30—Suit to recover money
due on an award—Specific performance—Damages.*

In a suit for the recovery of a certain sum of money with interest due on an award and on the failure of the defendant to pay, for the recovery of the same from the defendant's property, it was contended that the plaintiff was not entitled to the relief sought, having regard to sections 21 and 30 of the Specific Relief Act (I of 1877).

Held, disallowing the contention, that the suit was not for specific performance. It was a suit for the recovery of money and for relief incidental thereto.

APPEAL from the decision of Krishnamukhram A. Mehta, Acting First Class Subordinate Judge of Surat, in Original Civil Suit No. 173 of 1893.

The facts material for the purpose of this report were as follows.

The plaintiff and the defendant were brothers. Some disputes having arisen between them with respect to their father's estate, they referred those disputes to an arbitrator, who after inquiry passed an award. Afterwards the plaintiff made an application to the Court under section 525 of the Civil Procedure Code (Act XIV of 1882) for a decree in the terms of the award stating that though he was willing to abide by and carry out the terms of the award, the defendant was unwilling to do so, the

1903.

FARDUNJI
EDALJIv.
JAMSEDJI
EDALJI.

Court referred the plaintiff to a regular suit. The plaintiff, thereupon, in the year 1898, filed the present suit to recover from the defendant, on the strength of the award, the sum of Rs. 4,355-7-9 for principal and Rs. 841 for interest thereon at 9 per cent. per annum from the 1st July, 1896, till the date of suit, in all Rs. 5,196-7-9, with further interest at that rate till the date of payment, and in default of payment of the amount by the defendant to recover the same from the property that went to his share and for a declaration of the plaintiff's lien on the said property.

The defendant contended, *inter alia*, that the arbitrator's award was void; that the arbitrator omitted to decide matters entrusted to him and decided matters not so entrusted; that the plaintiff obtained the award by fraudulently concealing many properties and by misleading the arbitrator; that the arbitrator gave undue advantage to plaintiff; and that the award was, on its face, not supported by evidence and was full of inequity, injustice and partiality.

The Subordinate Judge found that the award was not inoperative; that the arbitrator had not exceeded his power and therefore the award was valid, and that the award was not bad on the ground of misconduct or partiality of the arbitrator or on any other valid ground. He therefore passed a decree for the plaintiff in the following terms:—

Under all these circumstances I order that the plaintiff do recover from the defendant Rs. 4,938-5-9 and that the plaintiff do pay into Court Rs. 350, with which promissory notes of $3\frac{1}{2}$ per cent. should be purchased in the joint names of the plaintiff and the defendant and the same to be handed over to Jamsedji, plaintiff, for custody, and the balance, if any, out of these Rs. 350 after the purchase of the promissory notes, should be divided equally between the plaintiff and the defendant. I decline to award any further interest after the date of the suit. The moveables awarded to the plaintiff are already given to him by the defendant and so there is no claim for that. The rest of the claim is rejected. Costs to be paid by the parties in proportion.

The defendant preferred an appeal.

Raikes and Harderram (with *G. S. Rao, Motabhai Motilal and Manubhai Nanabhai*), for the appellant (defendant):—The award does not finally settle the disputes between the parties. It creates a kind of trust and there is no mutuality of rights and liabilities.

Such a transaction cannot be given effect to: sections 21 and 30 of the Specific Relief Act—*Blackett v. Bates*.⁽¹⁾ The parties being not on good terms, the provisions of the award will give rise to continuous difficulties and will lead to disastrous results. We submit that this is not a case in which damages can be awarded, because damages will not afford adequate compensation. Further, the plaintiff has not performed his part of the award. The award provides for payment to us on account of our mother who has been staying with us; but nothing has been paid to us on that account. We have got nothing out of the cash of Rs. 6,000 which the deceased has left. We have not obtained the whole of our share in immoveable property.

Scott (Advocate General, with *H. C. Coyaji*), for the respondent (plaintiff) was not called upon.

JENKINS, C. J.:—First, Mr. Raikes contends that having regard to sections 21 and 30 of the Specific Relief Act, the plaintiff is not entitled to the relief he seeks; secondly, he argues that the plaintiff fraudulently concealed from the arbitrator that which should have been disclosed; and thirdly, he asks us to hold that the arbitrator has been guilty of such misconduct as that effect should not be given to the award.

The first of these objections proceeds on the assumption that the suit is one for specific performance, but in our opinion it clearly is not; it is a suit for the recovery of money and for relief incidental thereto. Mansfield, C. J., it is true, has said that pecuniary damages upon a contract for payment of money are from the nature of the thing a specific performance (see *Johnson v. Bland*, 2 Burr. 1086), but on this Sir Edward Fry, in his work on Specific Performance, has made the following comment:—"The remark seems hardly accurate. No doubt the sum agreed to be paid will be the measure of damages, and the amount paid will be same whether the contract be performed or broken. But in the former case the money is paid in performance of the contract: in the latter case it is paid as satisfaction for its non-performance. It is obvious that the consequences of the two payments would therefore be different." This statement of Sir

1903.

FARDUNJI
EDALJI
vs.
JAMSETJI
EDALJI.

(1) (1865) 1 Ch. App. 117.

1903.

FARDUNJI
EDALJI

v.
JAMSETJI
EDALJI.

Edward Fry's should, in our opinion, be accepted by us as affording the true answer to Mr. Raikes' argument, and we therefore hold that the first objection cannot prevail.

The Court held that the other two objections raised by Mr. Raikes were also not sustainable.

Decree confirmed.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Jacob.

1903

July 23.

RAMCHANDRA PANDURANG SATHE (ORIGINAL PLAINTIFF), APPELLANT, v. KRISHNAJI VITHAL JOSHI (ORIGINAL DEFENDANT), RESPONDENT.*

Second appeal—Discovery of fresh evidence—Withdrawal of second appeal—Review petition—Practice.

When on coming to the High Court under second appeal it is discovered that there is evidence which ought to have been placed before the lower Courts, the proper practice to pursue is to allow the second appeal to be withdrawn in order that a review petition may be presented to the lower Appellate Court. But this course cannot be pursued when the review petition has been already presented to and rejected by the lower Court.

SECOND appeal from the decision of J. E. Modi, Additional First Class Subordinate Judge of Thána, with Appellate Powers, confirming the decree of G. L. Chandorkar, Subordinate Judge of Pen.

The plaintiff sued to recover from the defendant Rs. 1,139-0-9, the balance of principal, including interest due, under two *ruzu khátas* (Exhibits 5 and 6), both of the same date, namely, the 4th November, 1899. The suit was filed on the 28th January, 1901.

The defendant admitted the *ruzu khátas*, but pleaded that the claim with respect to Exhibit 6 was barred by limitation.

The Subordinate Judge found that the plaintiff was entitled to recover Rs. 714-14-3 with proportionate costs and that the claim

* Second Appeal No. 719 of 1902.

under Exhibit 6 was time-barred. He, therefore, passed a decree for Rs. 714-14-3 and rejected the rest of the claim on the following grounds :—

1903.

RAMCHANDRA
v.
KRISHNAJI.

Plaintiff himself admits (Exhibit 18) that the money of the *khāta* (Exhibit 6) was not advanced on the day mentioned in the *khāta* itself and that the same was advanced in his father's time. He further adds that he has no knowledge either of the different items advanced from time to time or the dates on which they were advanced. Now as Exhibit 6 is a *rusu khāta* merely and not a promissory note, plaintiff is bound to prove the dates of the original advances and to show further that the *khāta* sued upon is within time from those dates. It is now settled law that a *rusu khāta* by itself cannot form the basis of action and that the claim must be based on the original advance and the later *khāta* must be produced to show that the claim is within time up to date. But in this case plaintiff has absolutely no material to show how many years ago the original advance was made and whether the claim as to that loan is still within time. The difficulty would have been at an end if the *khāta* sued upon (Exhibit 6) had contained a promise to pay, which is actually not the case. I therefore hold that Exhibit 6 is time-barred and find the third issue (namely: "Is any portion of the claim time-barred?") in the affirmative to the extent of the money contained in Exhibit 6 only.

On appeal by the plaintiff the Judge confirmed the decree on the 29th August, 1902. Subsequently on the 13th October, 1902, the plaintiff applied for review of judgment under section 623 of the Civil Procedure Code (Act XIV of 1882) on the ground that after the decision of the appeal he got information of certain *khātas* and accounts which, if admitted in evidence, would prove that his claim under Exhibit 6 was not barred inasmuch as it was kept alive from time to time. The Judge rejected the application on the 24th November, 1902, on the ground that if the plaintiff had been diligent enough while the case was pending, he would have been in a position to produce in time the evidence which came to his knowledge subsequently.

The plaintiff preferred a second appeal.

Daji A. Khare (with *G. K. Dandekar*), for the appellant (plaintiff).—Our contention is that the Judge should have admitted the evidence which we had tendered with our petition of review. The facts in connection with the petition were stated in detail in our affidavit annexed to the petition. The previous *khātas* and account-books were in the possession of our brother *Krishnaji*,

1903.
 RAMCHANDRA
 v.
 KRISHNAJI.

who was not favourably disposed towards us and therefore would not allow us to have access to them. We had summoned him as a witness in the first Court to appear and to produce documents in his possession, but he did neither. When he came to know of the adverse decision against us in appeal, he informed us that he would produce the *khátas* and accounts in his possession if summoned by the Court. But our petition was rejected by the Court. If the evidence we sought to put in had been taken by the Court, it would have clearly shown that our claim with respect to Exhibit 6 was in time. We submit that the evidence may be admitted now under the power vested in the High Court by section 568 of the Civil Procedure Code (Act XIV of 1882).

Trimkamlal R. Desai (with *V. N. Manohar*), for the respondent (defendant).—The order rejecting an application for review is final under section 629 of the Civil Procedure Code and it cannot be interfered with in second appeal. Besides this, the evidence referred to in the petition of review consisted merely of *khátas*. Such evidence is not sufficient to keep the original transaction alive: *Gobind Sundari v. Jagadamba Debia* ⁽¹⁾; *In the Goods of Premchand*; *Upendra Mohan Ghose v. Gopal Chandra Ghose*.⁽²⁾

S. R. Bakhle (for *D. A. Khare* with *G. K. Dandekar*) in reply.—The evidence produced along with our petition of review consisted not only of *khátas* but also *baitha khátas* (account-books), evidencing payment of interest as well as part-payment of principal. Such evidence would save the bar of limitation.

In *Nanabhai v. Nathabhai* ⁽³⁾ this Court allowed the second appeal to be withdrawn so that the appellant might apply to the lower Court for review of judgment on the ground of the discovery of fresh evidence. Joint Second Appeals Nos. 8 and 9 of 1900 from the Ratnágiri District were decided by this Court (Candy and Crowe, JJ.) on the 26th August, 1901, and in Second Appeal No. 9 evidence was allowed to be put in and the decree of the Judge was modified.

(1) (1868) 3 Beng. L. L. P. C. 25.

(2) (1894) 21 Cal. 484, 486.

(3) (1872) 9 Bom. H. C. R. 89.

1908.

• RAMCHANDRA
v.
KRISHNAJI.

JENKINS, C. J.—The 11th ground of appeal is in these terms :—

“The lower Appellate Court should have taken in evidence the *khátas* and account-books produced by the plaintiff with his review application.” The facts with regard to this point are that the plaintiff was unable to produce the *khátas* and the account-books prior to the first hearing of the appeal by the lower Appellate Court, but, subsequently to its decree, the position had altered and the plaintiff was in a position to produce those documents, and it seems clear from the statements that have been made before us that, had those documents been forthcoming, the plaintiff would have had a very much better chance indeed of establishing his case and meeting the plea of limitation. These matters were placed before the lower Appellate Court by way of review. But it was there decided that the plaintiff should not be afforded the opportunity he sought. We very much regret that decision, as it was not calculated to advance the ends of justice. However there the matter ends, for that order is final. It has been suggested however that we can interfere on the second appeal.

Now I am clear that the case does not fall within section 568, Civil Procedure Code, even if it can be contended that clause (b) of that section could apply in second appeal. So we have to see whether there is anything else that we can do. We have been referred to a decision of an Appellate Bench of this Court in which evidence no doubt was admitted in second appeal. But the ground on which that course was taken is not sufficiently apparent to allow us to accept that case as a guide to us in this appeal. We think there can be no doubt as to the proper practice to pursue when on coming to this Court on second appeal it is discovered that there is evidence which ought to have been placed before the lower Courts. It is indicated as far back as 1872 in the case of *Nanabhai Vallabdas v. Nathabhai Haribhai*,⁽¹⁾ where Sir Michael Westrop points out that the practice is to allow the second appeal to be withdrawn in order that a review petition may be presented to the lower Appellate Court. I think it has always been recognized that in that practice the Court has

(1) (1872) 9 Bom. H. C. R. 89,

1903.
 RAMCHANDRA
 v
 KRISHNAJI.

strained its powers to its utmost limits, and I do not think that we would be justified in going beyond that. Now what would be the result if we were to adopt such a course here? It would obviously be fruitless, because the review petition has already been presented to and rejected by the First Class Subordinate Judge, A. P.

I see no alternative in this case but to confirm the decree of the lower Appellate Court with costs.

Decree confirmed.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

1903.
 July 28.

ABDUL ALI ABDUL HUSEN (ORIGINAL DEFENDANT), APPELLANT, v.
 MIRJA KHAN ABDUL HUSEN (ORIGINAL PLAINTIFF), RESPONDENT.*

Registration Act (III of 1877), section 77—Making of the order—Date of the order—Date of communication—Running of time for suit.

The expression "making of the order," in section 77 of the Indian Registration Act (III of 1877), means not merely recording the order of refusal in writing, but communicating it to the party concerned so as to bind him by it.

Hence, a suit brought under the provisions of section 77 of the Indian Registration Act (III of 1877) for a decree directing a document to be registered, may be filed within thirty days of the date on which the order of refusal was communicated to the party concerned.

SECOND appeal from the decision of H. L. Hervey, District Judge of Surat, confirming the decree passed by Lallubhai P. Parekh, First Class Subordinate Judge at Surat.

On the 17th June, 1901, a deed-of-gift was passed in favour of the plaintiff by Mariambu, the mother of the defendant. Mariambu died the next day. On the 8th October, 1901, plaintiff presented the document to the Sub-Registrar for registration. But the Sub-Registrar refused to register the document, as the defendant failed to appear in obedience to the summons issued to him. Against this order plaintiff preferred an appeal to the District Registrar, who rejected the appeal, on the 21st December, 1901, on the ground that there was no mark of the executant

* Second Appeal No. 173 of 1903.

on the document. This order was communicated to plaintiff on the 22nd December, 1901.

1903.

On the 21st January, 1902, plaintiff instituted a suit to obtain an order directing registration of the deed dated 17th June, 1901.

ABDUL ALI
v.
MIRJA KHAN.

Defendant contended (*inter alia*) that the suit, not having been brought within thirty days from the date of the order, was time-barred, under the provisions of section 77 of the Indian Registration Act (III of 1877).

The Subordinate Judge held that the suit was not barred; and on appeal his decision was upheld by the District Judge who said :—

“The question is whether the suit is barred by limitation because it was not instituted within thirty days of the date of the original order. I think that the lower Court's view that the order must be held to date from the communication of it to the plaintiff is consistent with common sense and is correct. As far as I have been able to discover, this particular point has not hitherto been raised in any reported case under the Registration Act, but the Madras High Court has held that under section 25 of Act XXVIII of 1860 (Madras Boundary Act) which contains a provision limiting the period allowed for the institution of a suit analogous to that contained in section 77 of Act III of 1877, time does not begin to run until the date on which the decision sought to be set aside is communicated to the parties (*Annamalai v. Cloete*—I. L. R. 6 Mad. 189). It is pointed out that under any other interpretation of the section, the party aggrieved might be barred of his right of appeal without any knowledge of the order having been passed. The same remark obviously applies to a suit under section 77 of the Registration Act. The facts in the present case show that a considerable interval may elapse before the Registrar's decision is communicated to the applicant, and it can hardly be contended that if this interval should happen in any particular case to extend to thirty days, applicant would be deprived of all means of redress.”

The defendant appealed to the High Court.

M. N. Mehta, for the appellant :—The period of thirty days should be counted from the date of the order. There is nothing in the section which postpones limitation till the date of communication. The words should be given their natural construction. There is no hardship in this case. Plaintiff knew on the 22nd December, 1901, that the date on the order was the 21st December, 1901, and yet he did not bring this suit till the 21st January, 1902.

1903.

ABDUL ALI
v.
MIRJA KHAN.

Manubhai Nanabhai, for the respondent :—The section requires the suit to be brought within thirty days from the *making* of the order. The lower Court has not *added* any words to the section. The only question is, when could the order be said to have been *made*. The order could not be taken as made merely by writing it out and keeping it back. It must be brought to the knowledge of the party ordered. The case of *Annamalai v. Col. J. G. Choete* ⁽¹⁾ is on a different enactment, but it lays down a sound principle of construction consistent with common sense.

CHANDAVARKAR, J.:—The lower Courts have held that the plaintiff's suit is within limitation, because in their opinion it must be taken to run from the date on which the order of the Registrar was communicated to the plaintiff. We agree with that view. An order does not become an order unless and until steps are taken by the officer passing it to bring it to the consciousness and knowledge of the party against whom it is passed. If the party affected by the order acts in such a way as to prevent the officer from communicating it to him within reasonable time after he has written it, it may be that the date of the order would be the date when it could have been brought to the knowledge of the party within a reasonable period. But in the present case, it is not contended that there was any conduct of that kind on the part of the plaintiff. It is found by both the Courts that though the order was recorded in writing on the 21st December, 1901, it was communicated to the plaintiff on the 22nd December, 1901, and section 77 of the Registration Act provides that the suit to set aside such an order must be brought within thirty days from the making of it. We think that the words "the making of an order" must mean not merely recording it in writing, but communicating it to the party concerned so as to bind him by it.

We accordingly confirm the decree of the lower Appellate Court with costs.

Decree confirmed.

(1) (1883) 6 Mad. 189.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Jacob.

GURUVAYYA GOUDA AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS,
v. DATTATRAYA ANANT AND OTHERS (ORIGINAL DEFENDANTS),
RESPONDENTS.*

1903.
July 28.

Limitation Act (XV of 1877), section 22—Civil Procedure Code (Act XIV of 1882), section 32—Suit to recover possession—Suit by one of the plaintiffs as manager of the family—Right of manager to sue—Objection as to non-joinder at a late stage—Joinder of co-plaintiffs after the period of limitation—Limitation.

A suit to recover possession of a house was originally brought by two plaintiffs, the second plaintiff being described as the manager of the family. Subsequently at a late stage of the suit, the defendants having raised an objection of non-joinder of parties, the other members of the family who, however, stated that they were satisfied to be represented by the plaintiff 2 as the manager of the joint family, were joined as co-plaintiffs, but after the expiry of the period of limitation prescribed for the suit. The first Court allowed the claim. The Judge in appeal reversed the decree and dismissed the suit as time-barred under section 22 of the Limitation Act (XV of 1877).

Held, reversing the decree of the Judge and restoring that of the first Court; that section 22 of the Limitation Act (XV of 1877) does not in itself purport to determine directly whether the joinder of the parties after the institution of a suit shall in all cases necessarily involve the bar of limitation, if the period prescribed for such a suit has then expired. Such a result must depend upon consideration of the question whether the joinder was necessary to enable the Court to award such relief as may be given in the suit as framed. If fresh parties are merely joined for the purpose of safeguarding the rights subsisting as between them and others claiming generally in the same interest, the determination (by application of the provisions of section 22 of the Limitation Act) of the date of the institution of the suit as regards such freshly joined parties does not ordinarily affect the right of the original plaintiff to continue the suit and would not therefore attract the application of the general provisions of the Limitation Act (XV of 1877).

The question of the right of a manager to sue in that capacity is rather one of authority, if the other co-sharers are adults, and the right to insist on the other coparceners being brought on the record is for the benefit of the defendant to insure himself against further litigation and is therefore dependent on the objection being taken at an early stage, the objection on the score of want of authorization being one of a character which it would clearly be open to the defendant to waive.

1933.

GURUVAYYA.

v.
DATTATRAYA.

SECOND appeal from the decision of J. C. Gloster, District Judge of Kárwár, reversing the decree of T. V. Kalsulkar, Subordinate Judge of Sirsi.

On the 14th September, 1877, plaintiffs 1 and 2, of whom the latter was described as the manager of the family of which the plaintiffs along with others were members, sued defendant 1 to recover possession of the house site, and compound in dispute and to recover arrears of rent. The plaint alleged that defendant 1's deceased undivided brother Anantayya rented the property about eleven years ago for rupees twelve per year; that the rent till the 7th March, 1894, was paid by defendant 1 to the plaintiffs; that further rent was not paid; that defendant 1 was the heir of the deceased Anantayya and had been in possession of the property; that on the 27th August, 1897, the plaintiffs gave notice to defendant 1 to pay the arrears of rent and to vacate the property, and that their failure to do so gave rise to the present suit.

Defendant 1, who was originally the only defendant, having failed to appear on the appointed day, namely, the 31st May, 1898, an *ex-parte* decree was passed against him, but he having applied for the setting aside of that decree the Court granted his application and, thereupon, he on the 24th September, 1898, denied the letting and contended, *inter alia*, that he was not the heir of the deceased Anantayya; that one Gopalkrishna, a minor, was the heir of the deceased; that plaintiffs 1 and 2 were not the owners of the property in suit, but they were simply *benamidars* under a sale-deed dated the 26th October, 1885; that he (defendant 1), one Subrao Anantayya, and the minor Gopalkrishna were the owners of the property, and the latter two ought to have been joined as parties; that the sale-deed was passed to plaintiff 1 and the uncle of plaintiff 2 owing to the confidence and friendship between them and the deceased Anantayya, and also because the deceased was a Government servant; that since the date of the sale-deed the Government assessment was paid by the deceased Anantayya or for him, and plaintiffs never paid it or never enjoyed the property, and that he had sold his one-third share in the property to one Mangeshrao Annappa and was, therefore, in no way liable to the claim.

1903.

GURUVAYYA
v.
DATTATRAYA.

On the contention of the defendant, Subrao Anantayya, Gopalkrishna and Mangeshrao Annappa having been joined as defendants 2, 3 and 4, respectively, on the 14th September, 1898, they raised the same objections, and further contended that the suit was time-barred.

At the eighth hearing of the suit the defendants by an application dated the 16th June, 1899, contended that the plaintiffs had omitted to join the remaining members of their family as parties to the suit. Notices were thereupon issued to those members, and they having appeared stated that they had no objection either to the suit being proceeded with at the instance of plaintiff 2 as the manager of the family or to their being brought on the record. The Court ordered them to be joined as co-plaintiffs, and they were accordingly joined as plaintiffs 3—13 on the ninth day of the hearing, that is, on the 30th June, 1899.

The Subordinate Judge found that the plaintiffs were the owners of the property in suit; that the suit was within time, and that the plaintiffs were entitled to recover possession of the property. He, therefore, passed a decree directing the plaintiffs to recover possession of the property and mesne profits from the date of suit till delivery of possession. The claim for arrears of rent was disallowed. With respect to the point of limitation the Subordinate Judge observed as follows:—

The suit is in time. The sale-deed (Exhibit 18) is dated 26th October, 1885. The suit was filed on 14th September, 1897, *i.e.*, within twelve years from the date of the sale-deed. Defendant No. 1 is really in possession. . . . He was made a party before. Defendants 2 to 4 were afterwards added on 14th September, 1898. These latter defendants are not necessary parties, they not having title and not being in possession. Hence, plaintiffs do not lose anything if the suit is time-barred as against them under section 22 of Act XV of 1877. Plaintiffs 3 to 13 were afterwards added on 30th June, 1899, *i.e.*, more than twelve years after the plaint was filed. The sale-deed (Exhibit 18) is passed in plaintiff 1's name and in the name of plaintiff's uncle. Plaintiff 2 sues now as manager. Other plaintiffs were added as having interest in the subject-matter of the suit. Defendants contended that the suit is barred under section 22 of Act XV of 1877. They stated that the case (*Kalidas Kevaldas*—I. L. R. 7 Bom. 217) applied and therefore the suit should be dismissed. I think the case does not apply. The objection was not taken by defendants on or before the first hearing under section 34 of the Civil Procedure Code (Exhibit 88). Under the circumstances, on the principle of the case (*Shirekuli Timappa*,

1903.

GURUVAYYA
v.
DATTATRAYA.

Hegde v. Ajjibal Narashinha Hegde and another—I. L. R. 15 Bom. 297) the suit is in time.

On appeal by the defendants the Judge agreed with the Subordinate Judge as to the merits of the plaintiffs' claim, but he being of opinion that it was time-barred reversed the decree and dismissed the suit for the following reasons :—

On the question of limitation, it is argued on behalf of the appellants that section 22 of the Limitation Act applies, and that, inasmuch as defendants 2, 3 and 4 and plaintiffs 3 to 13 were added more than twelve years after the alleged cause of action, the whole suit should be dismissed.

As regards the late joinder of the three defendants, I do not think it is fatal, for plaintiffs' title being established the relief is really sought against the person in wrongful possession and the evidence shows that that is defendant 1. Further, if the case be treated as governed by article 144, I do not think the defendants have established adverse possession for twelve years. And if, as defendants contend, they are entitled on plaintiffs' case to take article 139 as applicable, then, too, inasmuch as the period must be computed from the expiration of the one year's alleged lease, namely, from November, 1886, all the defendants were joined before the period of limitation : compare *Chandri v. Daji Bhai*—I. L. R. 24 Bom. 504.

The plaintiffs 3 to 12 were, however, not added till June, 1899, more than twelve years after the accrual of the cause of action as calculated above. The Subordinate Judge relies on the decision in *Shirekuli Timappa v. Ajjibal Narashinha*—I. L. R. 15 Bom. 297. The judgment in that case, which is a very brief one, apparently distinguished it from the case of *Kalidas v. Nathu*, I. L. R. 7 Bom. 217, on the ground that the defendants had taken no objection on the ground of non-joinder of parties and no fresh parties had in fact been joined.

The position here is different. Defendants did take objection (Exhibit 88), and as the result plaintiffs 3 to 12 were added.

That they were necessary parties cannot be doubted : see *Hari Gopal v. Gokuldas*, I. L. R. 12 Bom. 158, and, after careful consideration, I am unable to accept the Subordinate Judge's finding that the case of *Kalidas v. Nathu*, I. L. R. 7 Bom. 217, is inapplicable merely on the ground that the objection was not taken at or before the first hearing. The provisions of section 22 of the Limitation Act seem to me clear.

Plaintiffs preferred a second appeal.

Nilkanth A. Shiveshvarkar, for the appellants (plaintiffs) :—Our contention is that even plaintiff 1 alone was competent to bring the suit because the sale-deed was passed to him and plaintiff 2's uncle, who was dead at the time of the suit. Plaintiff 2 was

joined in his capacity as the agent of all the members of the family. It was not at all necessary to join him, but he was joined simply for the purpose of satisfying the Court that the interest of the other members of the family was not overlooked. Further, the co-plaintiffs subsequently joined were not brought on the record by our application. The Court of its own motion joined them as co-plaintiffs under section 32 of the Civil Procedure Code. Therefore, the bar of limitation cannot arise: *The Oriental Bank Corporation v. J. A. Charriot*,⁽¹⁾ *Fakers v. Bibi Azimunnissa*.⁽²⁾

Further, the defendants having failed to raise the plea of non-joinder at the earliest opportunity under section 34 of the Civil Procedure Code, they must be considered to have waived their right to object: *Shirekuli Timappa v. Ajjibal Narashinha*.⁽³⁾

Our suit was not based on any contract. It was a suit in ejectment. The Judge has relied on *Kalidas Kevaldas v. Nathu Bhagvan*,⁽⁴⁾ which has no application to the present case. In that case the property involved was a joint debt for the recovery of which all the persons interested were necessary parties. Section 32 of the Civil Procedure Code refers to the Limitation Act when defendants are added and not when plaintiffs are added. Defendants have not complied with the provisions of section 34 of the Civil Procedure Code. They did not raise the objection of non-joinder of plaintiffs at the earliest stage. They raised the objection after all the evidence was recorded and after the case was heard eight times.

[JENKINS, C. J., referred to *Subodini Debi v. Cumar Ganoda Kant*⁽⁵⁾ and *Rarji Appaji v. Mahadev Bapuji*.⁽⁶⁾]

Our next objection relates to the arrears of rent. The first Court held that we were owners and were entitled to recover possession. If we are owners, we are entitled to recover arrears of three years.

Shamrav Vithal, for the respondents (defendants):—The property belonged to the undivided family of the plaintiffs, though the sale-deed was in the names of plaintiff 1 and the uncle of

(1) (1886) 12 Cal. 642.

(2) (1899) 27 Cal. 540.

(3) (1890) 15 Bom. 297.

(4) (1883) 7 Bom. 217.

(5) (1887) 14 Cal. 40.

(6) (1897) 22 Bom. 672.

1903.

GURUVAYYA
v.
DATTATRAYA.

1903.
GURUVAYYA
v.
DATTATRAYA.

plaintiff 2. The consideration for the sale proceeded from the family, therefore all the members ought to have been originally brought on the record: *Navheri v. Shek Jamal*.⁽¹⁾

The plaintiff had not brought the suit as the surviving party to the sale-deed. He has not based his suit on the sale-deed alone, but has joined plaintiff 2 who was not a party to the sale transaction. A mere description of the plaintiff that he was the manager of the family would not enable him to bring a suit without joining all the other members. The property is not described in the plaint as the property of the family. When there is a joint family, any action taken with respect to the family property must, at the outset, be for the benefit of all the members: *Mayne's Hindu Law*, Sixth Edition, section 298, page 368.

[JENKINS, C. J.:—But in the present case under the sale-deed the property vested in the two purchasers.]

We submit that notwithstanding that circumstance when the suit is for the recovery of family property all the members of the family must appear on the record: *Bhattacharya on Hindu Law*, page 232—*Gokool Pershad v. Etwaree Mahta*.⁽²⁾ The Bombay and Madras rulings have laid down that a manager, describing himself as such, cannot bring a suit without joining all the members: *Angamuthu Pillai v. Kolandavelu Pillai*,⁽³⁾ *Hari Gopal v. Gokaldas*,⁽⁴⁾ *Hari Vasudev v. Mahadu Dad Gauda*.⁽⁵⁾ If plaintiff 1 alone had brought the suit, then the question of non-joinder would not have arisen, but as he joined plaintiff 2 as the manager, that question arose. The claim is time-barred because the additional plaintiffs were joined twelve years after the accrual of the cause of action.

Shiveshvarkar, in reply :—In the cases relied on, the objection as to non-joinder was taken in the written statement, that is, at the earliest stage of the case.

JACOB, J. :—In this suit the plaintiffs sought to recover possession of a house and compound, with arrears of rent.

(1) (1903) 5 Bom. L. R. 577.

(3) (1899) 23 Mad. 190.

(2) (1878) 20 W. R. 135.

(4) (1887) 12 Bom. 158.

(5) (1895) 20 Bom. 435.

The Court of first instance awarded the claim except in respect of the rents.

1903.

GURUVAYYA

v.

DATTATRAYA.

On appeal by the defendants the District Judge, while concurring with the Subordinate Judge as to the merits of the case, held the suit to be barred by limitation.

The grounds on which this decision was based were the following:

The cause of action was held to have accrued at the latest in November, 1886.

The suit was in the first place instituted on the 14th September, 1897, by plaintiffs Nos. 1 and 2 alone, after certain proceedings, involving the joinder of additional defendants, the particulars of which it is unnecessary for the purposes of this appeal to specify, objection was taken by defendant 1 in an application presented on the 16th June, 1899, that there were other members of the joint family to which the property was alleged to belong, who must be joined as co-plaintiffs. Notices were then issued by the Court under section 32 of the Civil Procedure Code to plaintiffs Nos. 3—13, and on their statements that they were satisfied to be represented by plaintiff No. 2 as manager of the joint family, but that they had no objection to be joined as co-plaintiffs, they were brought on the record as such on the 30th June, 1899. The period of limitation had then expired, and the District Judge, applying the provisions of section 22 of Act XV of 1877, held that the suit must therefore be dismissed.

Now, section 22 of Act XV of 1877 does not in itself purport to determine directly whether the joinder of parties after the institution of a suit shall in all cases necessarily involve the bar of limitation, if the period prescribed for such a suit has then expired. Such a result must depend upon consideration of the question whether the joinder was necessary to enable the Court to award such relief as may be given in the suit as framed.

Now, plaintiff 1 was set out in the plaint as the actual lessor with whom the deceased Anantayya contracted, but the lower Courts have held the alleged oral leases to be not proved, and the suit as it is now before us must be regarded as one for the ejectment of the defendants as trespassers.

1903.

GURUVAYYA
v.
DATTATRAYA.

For the purposes of such a claim it is not open to us to consider in this suit the suggestions that plaintiff 1, by virtue of his purchase in his own name, might be regarded as alone representing the legal estate of the joint family, or as occupying the position of a trustee on behalf of the other co-sharers, with a view to calling in aid the provisions of section 437 of the Civil Procedure Code. The sale-deed was not even mentioned in the plaint, and any questions raised in the suit in connection with the purchase had reference to the contention of defendant 1 that the purchase was *benami* for the benefit of his deceased brother.

It is further clear that plaintiff 2 was from the outset joined as manager of the joint family in view of the alternative prayer for declaration of their ownership, and for consequential recovery of possession of the property, failing proof of the oral leases.

The question therefore before us is rather, whether the claim could have been decreed in the suit of plaintiff 2 as manager, or whether the non-joinder of the other co-sharers, minors and adults, was a defect which could be overlooked by reason of the delay on the part of defendants in taking objection to it. If fresh parties are merely joined for the purpose of safeguarding the rights subsisting as between them and others claiming generally in the same interest, the determination (by application of the provisions of section 22 of the Limitation Act) of the date of institution of the suit as regards such freshly joined parties does not ordinarily affect the right of the original plaintiff to continue the suit, and would not therefore attract the application of the general provisions of the Limitation Act.

The main question in this appeal is whether, had the additional plaintiffs not been joined, it would have been competent to the Subordinate Judge to pass a decree for ejectment against the defendants, on the facts alleged and proved, in favour of the original plaintiffs.

Now it appears to be settled law as summarised by Mr. Mayne (Sixth Edition, page 368) that "a single member cannot sue. . . to recover a particular portion of the family property for himself, whether his claim is preferred against a stranger who is asserted to be wrongly in possession or against his coparceners. If the former, all the members must join, and the suit must be brought

to recover the whole property for the benefit of all.If from any cause, such as lapse of time, the other members cannot be joined as plaintiffs, the whole suit will fail."

In the case of *Arunachala v. Vythialinga* ⁽¹⁾ an exception appears to have been recognized in favour of a managing member of the family, who has instituted the suit in that capacity, but this was a mere *obiter dictum*, and has since been dissented from in *Alagappa v. Vellian* ⁽²⁾ and *Angamuthu v. Kolandavelu*. ⁽³⁾

The authority last cited is directly against the appellants, as the suit there as here was brought by the plaintiff as family manager, claiming the property on behalf of the family. The Bombay High Court, however, has not regarded the right of the manager of the family to sue alone in that capacity for family property as absolutely excluded.

In *Kalidas v. Nathu* ⁽⁴⁾ the original plaintiff was not the manager of the family. It is true that in *Hari Gopal v. Gokaldas*, ⁽⁵⁾ Sargent, C. J., points out that this would not afford ground for distinguishing such a case as the present one, but at the same time he plainly indicates that the question of the right of a manager to sue in that capacity is rather one of authority, if the other co-sharers are adults, and that the right to insist on the other coparceners being brought on the record is for the benefit of the defendant to insure himself against further litigation and is therefore dependant on the objection being taken at an early stage, the objection on the score of want of authorization being one of a character which it would clearly be open to the defendant to waive. This principle was acted upon in another case reported at page 300 of the Printed Judgments of 1890 (*Shirekuli Timappa v. Ajjibal Narashinha*) and applying the same to the case now before us, we must hold that the bar of limitation was not established, as the defendant's objection to non-joinder of parties having been taken at a late stage of the suit may be disregarded.

The case of *Shiwajiram v. Vishnu* ⁽⁶⁾ is distinguishable. There, although it appears to have been proved as a fact that the

1903.

GURUVAYYA

v.

DATTATRAYA.

(1) (1882) 6 Mad. 27.

(2) (1894) 18 Mad. 33.

(3) (1899) 23 Mad. 190.

(4) (1883) 7 Bom. 217.

(5) (1887) 12 Bom. 153.

(6) (1900) 2 Bom. L. R. 121.

1903.
 GURUVAYYA v. DATTATRAYA. plaintiff had been recognized as manager by the whole family, the suit had actually been instituted by the plaintiff in his individual capacity.

We purposely refrain in this case from resting our decision in any measure on the authority of the ruling of the Calcutta High Court in *Grish Chunder Sasmal v. Dwarka Nath Dinda* ⁽¹⁾ which was cited at the hearing, as that ruling appears to proceed upon a misapprehension of the principle affirmed in *The Oriental Bank Corporation v. Charriot* ⁽²⁾ on which alone it purports to be based. What had there been held was that a Court in joining parties under section 32 of the Civil Procedure Code was untrammelled by any question of limitation in respect of an application for such joinder, not that the joinder could be made in disregard of any question of limitation in respect of the suit itself as affected by such joinder.

For the reasons above given, we reverse the decree of the District Judge and restore that of the Subordinate Judge with costs of both appeals on the defendants.

Decree reversed.

(1) (1897) 24 Cal. 640.

(2) (1886) 12 Cal. 642.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Aston.

1903.
 July 29. NAVROJI MANEKJI WADIA AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, v. DASTUR KHARSEDJI MANCHERJI AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Civil Procedure Code (Act XIV of 1882), section 539—Atash Behram (Parsi fire-temple)—Parsi community of Udhwada—Trust—Suit—Capacity to hold property—Mandatory injunction—Trespasser—Removal of encroachment.

In this country a fluctuating body of persons, such as a village community, is capable of owning property.

It is opposed to the notions of the Parsi community that the Iran Shah (sacred fire) should be regarded as capable of, or the subject of, ownership; but even if there be difficulty or doubt as to its ownership, it is obvious that there

* Appeal No. 106 of 1900.

must be some one entitled to protect from improper invasion the temple property, and those who can predicate of themselves that they have exercised the management, authority and supervision as alleged in the plaint, are so entitled.

The Parsi inhabitants of Udwada, as the Anjuman (that is, a constituted council or assembly to which all questions regarding their peculiar customs are referred) of that town, are vested with the control, management and supervision of the Atash Behram at that place and all that appertains to it.

A suit for the vindication of the right of management which is vested in, and actually being exercised by, the plaintiffs and those they represent at the date of the obstruction does not fall within section 539 of the Civil Procedure Code (Act XIV of 1832) merely because those who cause the obstruction happen to have been nominated trustees.

A mandatory injunction should not be granted against a trespasser compelling him to come on the land on which he had trespassed to remove an encroachment made thereon by him.

APPEAL from the decision of Lallubhai P. Parekh, First Class Subordinate Judge of Surat, in original Suit No. 239 of 1897.

Suit for certain declarations and injunction with respect to, and the right of, management of the Parsi Atash Behram (fire-temple) at Udwada in the Surat District.

After the conquest by the Arabs of the Kingdom of Persia in the seventh century, the inhabitants of that country migrated in parties to distant countries. One such armed party landed near Sanjan in Western India and asked the permission of the then ruling Chief to settle in the land, stating that they honoured the cow, water, fire, the sun and the moon; that they wore the sacred girdle and observed strict rules about the ceremonial impurity of women. The Chief granted them a spot on their agreeing to learn the language of the country, to make their women dress like Hindu women, to cease to carry arms, and to hold their marriages at night. On that spot they built a temple for the holy fire of angel Behram and the settlement prospered in every way. After the Parsis had been settled for nearly six hundred years in Sanjan, their Rajput Chief was attacked by the Mussalmans, who, having obtained a victory, the Parsis were driven from Sanjan. Those who escaped took their sacred fire with them to the Bharut hills near Sanjan. They remained in hiding in the hills for twelve years and afterwards went to Bandsa, taking with them the sacred fire. At Bandsa also their community prospered. In A.D. 1419 a Dawar, or religious layman,

1903.

NAVROJI
MANEKJI
WADIA

v.
DASTUR
KHARSEDJI
MANCHERJI.

1908.

NAVROJI
MANEKJI
WADIA
v.
DASTUR
KHARSEDJI
MANCHERJI.

named Changa Asa, built a magnificent fire-temple at Navsari and had the sacred fire brought from Bandsa to that place with great pomp by three Sanjan high priests, Nagan Ram, Khorshed Kamden and Chaya Sahiyar. Each of these three high priests had three sons. These nine sons became the founders of the present nine priestly families of Udwada. At Navsari disputes having arisen between the two bodies of priests, that is, the original priests on the one hand and those who had come from Sanjan on the other, the latter taking their sacred fire with them went to Surat in A. D. 1733. Afterwards on the 28th October, 1741, they moved to Udwada, where the original sacred fire has since remained.

The first building for the accommodation of the Atash Behram at Udwada was built by one Minochar Baman of Nargol. The second was built by Bhikaji Edalji of Surat in or about A. D. 1770. The third by Jamsetji Nanabhai Guzdar of Bombay about A. D. 1812 or 1815, but the evidence about the building by Guzdar was conflicting. The fourth was built by two brothers, Dadabhai and Mancherji Wadia, in March, 1830, and the fifth and the latest by Motlibai Jehangir Wadia in October, 1894. Subsequently under an indenture, dated the 2nd September, 1896, Motlibai appointed Navroji Manekji Wadia, Kavasji Kharsetji (afterwards Sir Jamsetji Jijibhai), Jijibhai Mervanji Wadia, Behramji Pestanji Bharda and Nasarvanji Jehangir Wadia, since deceased, as trustees to look after the Atash Behram. Under the orders of the trustees the three doors of the northern hall of the Atash Behram were, from the 19th October, 1896, daily closed and locked up at night between 9 P.M. and 6 A.M. Further, the trustees on or about the 7th November following completely blocked up a doorway in the compound wall between the Atash Behram and Dareh Meher built by Sir Dinsha Manekji Petit in 1891 to the west of the Atash Behram. The doorway was opened by Sir Dinsha at the request of the Anjuman (Society) of Udwada. These acts on the part of the trustees put the Parsi community at Udwada to great inconvenience and trouble which culminated in disputes. The plaintiffs, therefore, in the year 1897 brought the present suit on behalf of themselves and as representatives of the Parsi community of Udwada, alleging—

1903.

NAVROJI
MANEKJI
WADIAv.
DASTUR
KHARSEDJI
MANCHERJI

1. That they brought the suit with the permission of the Court duly obtained under section 30 of the Civil Procedure Code ; that the Atash Behram or the fire-temple of the Parsis at Udwarda was, with its site and diverse buildings and appurtenances from time to time dedicated for use in connection therewith, vested in the Parsi inhabitants of that town, and they have from time immemorial managed the same and exercised absolute authority in regard to the maintenance and administration thereof as a place of Zoroastrian religious worship and observances.

2. That nine priestly families of the Parsis of the said town of Udwarda have as of right and from time immemorial been the special delegates of the Parsi inhabitants of the said town for the purpose of supervising and managing the said Atash Behram, and the plaintiffs were members of some of the said nine families.

3. That the defendants were trustees appointed by and under an indenture dated 2nd September, 1896, and made between Bai Motlibai now deceased of the one part and the defendants and Nasarvanji Jehangir Wadia now deceased of the other part, whereby the said Motlibai assigned to the defendants and Nasarvanji Jehangir Wadia deceased certain securities upon trust for the purposes of the said Atash Behram and also conveyed to them certain lands upon trust to permit the same to be used as a place for public worship by all persons of the Zoroastrian faith and for the celebration of all rites and ceremonies of the Zoroastrian religion as heretofore observed ; that the lands so conveyed had been purchased by the said Motlibai and added to the previously existing compound of the Atash Behram, and in the compound so enlarged she erected a new Atash Behram in lieu of the old building ; that all this was done with the full concurrence of the Parsi community of Udwarda ; that on the 30th October, 1894, Motlibai formally made over the new building and the additional land so purchased by her to the said community for the purposes of the said Atash Behram.

4. That Motlibai was from the 30th October, 1894, a bare trustee of the newly purchased land for them and was not competent to convey to the defendants and N. J. Wadia, deceased, any estate or interest in the said lands other than the estate or interest of bare trustees ; that Motlibai professed to give to the defendants or at all events the defendants claimed to have, under the said indenture, the right to make rules and regulations for the management of the said Atash Behram.

5. That they denied that the defendants had any such right and that the said indenture was and ought to be declared by the Court to be inoperative so far as it purported to confer any such right on the defendants.

6. That the defendants claiming to act under the said power on or about the 7th day of November, 1896, erected a wall and thereby blocked up a door-way in the east wall of the compound of the building known as Dareh Meher and which adjoins the Atash Behram and thereby prevented communication between the Atash Behram and Dareh Meher through the said door-way and thus caused much inconvenience and hindrance to the priests and others who were

1903.

NATROJI
MANEKJI
WADIA
v.
DASTUR
KHARSEDJI
MANUHERJI.

in the habit of passing through the said door-way in the course and for the purpose of religious ceremonies and observances.

7. That the wall in which the said door-way was placed was not situated in the land purchased by Motlibai.

8. That the defendants had no right to block up the door-way. The plaintiffs were entitled to keep and to have it kept open, and the cause of action in respect of the door-way arose on the 7th November, 1896.

9. That the doors of the northern room of the Atash Behram used to remain open night and day. The defendants wrongfully and unjustifiably closed and locked up the two doors in the western wall and one door in the northern wall of the said room marked respectively B, C and D in the plan A from 8 P.M. to 6 A.M. on the 19th November, 1896, and continued doing so every day, thereby causing great inconvenience to the priests and others engaged in and about the Atash Behram.

10. That the plan A annexed to the plaint showed the relative positions of the said Atash Behram and the Darch Meher.

11. * * * *

12. That the plaintiffs prayed for relief as follows :—

(a) For a declaration that the indenture dated 2nd September, 1896, made by Bai Motlibai could not and did not confer on the defendants and the defendants did not possess any right or title whatsoever to interfere with or in the management or administration of the Atash Behram further or otherwise than by applying the moneys settled by the said indenture for the purposes thereby prescribed, and that so far as the said indenture related to the lands and hereditaments thereby conveyed, the defendants were bare trustees thereof for the Parsi community of Udwarda.

(b) For a declaration that the blocking up of the door-way marked E, F in the plan A annexed to the plaint and the closing at night of the three doors marked B, C and D in the plan were wrongful acts and not justified by any right or power vested in the defendants either under the said indenture or otherwise.

(c) For an injunction ordering the defendants and each of them to remove the wall marked G in the plan A built by them across the said door-way E, F so as to restore the said door-way to its former and open condition.

(d) For an injunction ordering the defendants not to close the doors B, C and D or any of them at any time.

(e) For an order perpetually enjoining the defendants not in any way to interfere with or in the management and administration of the Atash Behram further or otherwise than by applying the funds settled by the said indenture to and for the purposes mentioned by it.

The defendants answered—

1. That the Parsi fire-temple or Atash Behram at Udwarda was entirely rebuilt, preserved and enlarged by one Dadabhai Pestonji in 1830; that the said

1903.

NAVROJI
MANEKJI
WADIA

v.

DASTUR
KHARSEDJI
MANCHERJI.

• Dadabhai in consideration thereof was entrusted with the possession and complete management of the said temple; that he did the repairs, whitewashing, tile-turning and supplied fuel, oil, sandalwood and incense; that he appointed as his manager and agent thereof under him one of the Dasturs of Udwada, *viz.*, Dastur Dorabji Beheramji.

2. That on the death of the said Dorabji, his son Mancherji Dorabji was appointed manager and agent; that in 1863 the said Dadabhai appointed four other persons along with the said Mancherji as trustees of the said fire-temple and premises.

3. That on the death of Mancherji his son (plaintiff No. 1) was appointed as trustee in his place.

4. That Dadabhai, before his death, appointed his son Merwanji to succeed him as the person who had the right of control and management over the said premises; that the said Merwanji Dadabhai removed the first plaintiff from his position as one of the trustees.

5. That the said right of control was entrusted to Bai Motlibai in consideration of her having entirely rebuilt the said fire-temple; that she was entitled to appoint the trustee defendants trustees of the fire-temple and premises; that Navroji Manekji Wadia, who was one of the trustees, agreed to their continuing trustees after Motlibai's death; that the matters complained of were done with the consent of all the trustees and of Merwanji Dadabhai who represented the original rebuilder and preserver of the fire-temple; that their action had the approval of the great bulk of the Parsi community.

6, 7. That the plaintiffs were not entitled to maintain the suit in accordance with the provisions of section 30 of the Civil Procedure Code on behalf of the whole Parsi community of Udwada; that the plaintiffs did not show any such right in them; that there were many Parsis in Udwada who controverted the allegations made by the plaintiffs and who were opposed to the relief prayed for and that no cause of action had accrued to the plaintiffs in their own right.

8. That they did not admit the allegations made in paragraph 1 of the plaint, *viz.*, that the fire-temple of Udwada was vested in the Parsi inhabitants of that town and that such inhabitants had managed the same; that they contended that the Parsi inhabitants in common with the rest of the Parsi community at large had hitherto enjoyed and were entitled to enjoy only the right of Zoroastrian religious worship and observances in the said fire-temple and its appurtenant buildings.

9. That they did not admit that certain nine Parsi priestly families of Udwada had as of right and from time immemorial and as special delegates of the Parsi inhabitants of that town supervised and managed the said Atash Behram. They contended that the said nine families had enjoyed and were entitled to enjoy the rights of rendering due service to the *kebla* or the sacred fire enthroned and kept burning night and day in the said Atash Behram or fire-temple; that beyond that they had enjoyed no other special right in connection with the fire-temple and that defendant was a member of the said nine families.

1903.

NAVROJI
MANEKJI
WADIA
v.
DASTUR
KHARSEDJI
MANCHERJI.

10. That they admitted the allegations made in paragraph 3 of the plaint except the allegation that the new Atash Behram with the new piece of land purchased by Motlibai was formally made over to the Parsi community of Udwada on the 30th October, 1894. They contended that the new Atash Behram with its lands and buildings continued vested in possession in Motlibai until the date of the indenture, that is, 2nd September, 1896, and that since that date the said properties had become vested in them as mentioned in the indenture; that the new Atash Behram building was erected with the consent of the late Dadabhai Pestonji Wadia, the founder of the old fire-temple, but not with the concurrence of the Parsi community of Udwada, as in the plaint alleged; that the Parsi community of Udwada had no voice whatever in the erection of the new fire-temple, though it was no doubt erected at their request, for their benefit and use, as also for the benefit of all other Parsis.

11. That Motlibai was not a bare trustee of the said newly purchased land for the Parsis of Udwada after the 30th October, 1894; that she held and stood possessed of the land until the same was conveyed to the defendants and that the defendants had accordingly held the same and were entitled so to hold it as of right.

12. That the said indenture was valid and binding on all persons in respect of all matters and premises dealt with therein and was not in any way in excess of the rights and authority belonging to the settler of the said trust property; that neither the plaintiffs nor any other persons were entitled to have any provision of the indenture declared null and void or inoperative; that they (defendants) were entitled to make rules and regulations for the management of the Atash Behram; that Motlibai had power to invest the defendants with such authority, a power inherent in the very conception of the endowment made by her.

13. That the wall on the east of the Dareh Meher belonged to the Atash Behram; that the door-way in dispute was opened about seven years ago with the permission of the then managers and trustees of the Atash Behram; that it rested entirely with the said managers and trustees how long to keep the door-way open and how long to keep it closed according as they found it expedient and that the door-way was so managed until it was blocked up.

14. That an unjustifiable attempt was made interfering with the defendants' right to keep the door-way closed or open according as the defendants found it necessary; that the doors were affixed to the compound wall by means of posts driven into the ground and thus the closing of the doors was rendered impossible by Sir Dinsha's people; that by such action the Atash Behram was exposed to great insecurity; that for the due safeguarding of the interests of the Atash Behram they blocked up the door-way by raising a wall on the land belonging to the Atash Behram.

15. That the closing of the door-way was in no way calculated to occasion inconvenience or hindrance to the officiating priests or any members of the Zoroastrian community; that the plaintiffs, who did not profess themselves to be the trustees of the Dareh Meher, had no right to complain of the closing of the

1903.

NAVROJI
MANEKJI
WADIA

v.

DASTUR
KHARSEDJI
MANCHERJI.

door-way and that the question whether the door-way was rightfully or wrongfully closed up could not be adjudicated upon in this suit and that the trustees of the Darah Meher had employed the plaintiffs as tools in their hands to attain objects of their own.

16. That the compound wall in which the door-way opened was the property of the Atash Behram ; that alterations, additions and repairs were made to the wall by Motlibai.

17. That the plaintiffs had no right to have the same door-way kept open or to deal with and exercise right of control over it.

18. That the three doors marked B, C and D in the map A have been closed at night for the better protection and security of the Atash Behram and of the utensils and other articles belonging to the Atash Behram ; that the same was being done for a much longer time than the plaintiffs allege and that by so closing the doors at night no hindrance whatever was caused to the use of the Atash Behram for which it was intended ; that the closing of the doors was calculated to ensure due protection of the things of the Atash Behram and to prevent evil-minded people from making away with valuable things therefrom ; that the plaintiffs were not entitled to interfere with the due management of the said property and to require the defendants to keep the same doors open night and day.

19. The map A was wrong and inaccurate and it wrongly showed the wall which contained the disputed door-way as being the property of Darah Meher.

20. That the plaintiffs were not entitled to the reliefs (a), (b), (c) and (d) as claimed by them ; that Motlibai had not acted in excess of the rights and powers possessed by her.

21. That the very nature of the settlement of the funds and proper application thereof necessarily demanded the exercise of the powers the defendants have hitherto exercised and that such exercise was quite legitimate and proper.

22. That the plaintiffs were not entitled to impeach any portion of the indenture as invalid or inoperative without making the legal representatives of Motlibai parties to the case.

23. That the Court had no jurisdiction to entertain the suit, for it fell within the purview of section 539 of the Civil Procedure Code, nor was the suit maintainable without the consent of the Advocate General of Bombay.

24. That the plaintiffs ought to pay *ad valorem* Court-fee according to the costs of the fire-temple which amounted to upwards of Rs. 12,500, and that the suit should be dismissed and costs of the defendants should be awarded.

The following is the material portion of the trust-deed executed by Motlibai in favour of the trustees :—

And whereas the said Motlibai is desirous of setting apart a fund of rupees sixty-one thousand for the due maintenance of the said buildings and the performance and observance of the rites and ceremonies hereinafter mentioned And whereas with that intent the said Motlibai hath with the consent of the trustees (testified by their being parties to and executing these presents) trans-

1903.

NAVROJI
MANEKJI
WADIA
v.
DASTUR
KHARSEDJI
MANCHERJI.

ferred into the joint names of the trustees and delivered into their hands before the execution of these presents the securities specified in the second schedule hereunder written (which at the date hereof are of the market value of rupees sixty-seven thousand and four hundred) to be held by them upon the trusts in that behalf hereinafter declared And whereas the said Motlibai is also desirous of conveying to the trustees the said plots of land and the said buildings upon the trusts in that behalf hereinafter declared Now this Indenture witnesseth that in pursuance of the said desire the said Motlibai doth hereby voluntarily grant unto the trustees the hereditaments and premises particularly specified in the first schedule hereunder written Together with all buildings and edifices standing thereon (including the buildings so erected by the said Motlibai as aforesaid) and the furniture vessels and utensils now placed therein Together also with the rights and easements and appurtenances to the said premises belonging or enjoyed therewith To have and to hold the said premises unto and to the use of the trustees upon trust at all times to permit the same to be used as a place for public worship by all persons of the Zoroastrian faith and for the celebration of all rites and ceremonies of the Zoroastrian religion as hitherto observed And it is hereby agreed and declared that the trustees shall stand possessed of the securities specified in the second schedule hereunder written and all monies payable thereunder (hereinafter called "the trust-fund") upon trust to apply the net income thereof for or towards all or any one or more of the objects and purposes hereinafter mentioned that is to say:

(a) In the maintenance repairs and general up-keep of the main fire-temple building at Udwarda or any other buildings appurtenant thereto.

(b) In providing oil for the due lighting of the said temple and the outhouses thereto appertaining and in providing sandalwood firewood and incense for feeding the sacred fire.

(c) In the performance and observance of the Jassan ceremony on each anniversary day of the installation of the sacred fire Iran Shah which falls on the seventeenth day of the second month of every Zoroastrian Shenshai year.

(d) In the performance and observance of the Baj or ceremonies on each anniversary day of the death of the late Manekji Navroji Wadia (the husband of the said Motlibai) which happens on Mehr the sixteenth day of Ardiবেহest the second month in every Zoroastrian community Shenshai year and on each anniversary of the death of the late Jehangirji Nasarvanji Wadia (the father of the said Motlibai) which happens on Deptin the twenty-third day of Aban the eight month in every Zoroastrian Shenshai year.

(e) And generally in making arrangements for the perpetual turning for the sacred fire it being the pious desire and intention of the said Motlibai that the said fire-temple shall for all time to come hold the sacred fire Iran Shah and remain open for worship to all devout persons of the Zoroastrian faith And it is hereby further agreed and declared that it shall be lawful for the trustees to frame rules and regulations for the due government of the said trust premises with power from time to time to rescind or alter the

same and the rules for the time being and if thought necessary to substitute new rules and regulations in lieu thereof and it is hereby further agreed and declared that if in any year the whole of the income of the trust funds shall not from any cause whatever be applied for the objects and purposes aforesaid or any of them the trustees shall accumulate the surplus or residue of such income by way of compound interest by investing the same and the resulting income thereof from time to time in any of the securities hereinafter mentioned provided that the trustees shall have full liberty at any time if they think fit to apply the whole or any part of such accumulations as if the same were part of the income arising then in the current year.

The findings of the Subordinate Judge are embodied in the judgment of the Chief Justice. He passed a decree in the following terms :—

I therefore declare (a) that the defendants do not possess any right nor title whatever to interfere with or in the management or administration of the sacred fire called the Iran Shah and the Atash Behram buildings together with all affairs connected with the sacred fire and its property, funds, income, buildings, presents, &c., further or otherwise than

1. By repairing the Atash Behram buildings and providing the priests and worshippers with further accommodations for religious purposes with the monies settled by the indenture, Exhibit 141, provided that in doing so they (defendants) do not go against the wishes of Motlibai as expressed in the indenture and against the long established practice followed on such occasions.

2. By supplying *kathi* (fuel), sandalwood and other things necessary for feeding, worshipping and maintaining the sacred fire when they are allowed to do so, by the heirs and representatives of Merwanji Wadia.

3. By supplying oil for lamps and giving pay to Zadukus, servants, employed in the Atash Behram.

4. By seeing that the main Atash Behram building and the other buildings and open spaces including the compound walls attached to it are used for religious purposes, provided that in doing so, they (defendants) do not go against the religious practice and prejudices of the Udwada Anjuman and other worshippers.

5. By seeing that the censor and other things placed by Motlibai, or the defendants as her trustees in the Atash Behram are used and duly taken care of. If there is a chance of a dispute between them and the officiating priests regarding the safety or indiscreet use of the things, it will rather be advisable on their (defendants') part to keep away the thing with the permission of Udwada Anjuman than enter into litigation with the priests.

6. By seeing that the rites and ceremonies mentioned by Motlibai in the indenture, Exhibit 141, paragraph 12, are duly performed through the priests officiating in the Atash Behram.

7. By keeping in a room the furniture and other things supplied by Motlibai or by them as her trustees, which are not of daily use, provided that they do not shut out the Udwada Anjuman from the use of the furniture, &c., and the room.

1908.

NAVROJI
MANEKJI
WADIA
v.
DASTUR
KHARSEDJI
MANCHERJI.

1903.

NAVROJI
MANEKJI
WADIA
v.
DASTUR
KHAHSEDJI
MANCHERJI.

8. By applying the funds in their hands for the religious and charitable purposes mentioned in the indenture, provided that in doing so, they (defendants) do not invade the right of the plaintiffs and other members of the Udwada Anjuman.

I also declare that so far as the indenture relates to the lands and hereditaments thereby conveyed, the defendants are bare trustees thereof for the Parsi community of Udwada.

I also declare (b) that the acts of the defendants, *viz.*, blocking up the door-way E, F and the closing at night of the three doors B, C and D shown in the plan, Exhibit 273, were wrongful acts and not justified by any right nor power vested in the defendants, either under the indenture, exhibit 141, or otherwise.

I also order (c) that the defendants and each of them do remove the wall built by them across the door-way E, F which wall is marked G in the plan, Exhibit 273, so as to restore the said door-way to its former open condition.

I further order (d) that the defendants and each of them do refrain from closing the doors B, C and D shown in the plan, Exhibit 273, at any time and I further order (e) that the defendants do refrain perpetually from interfering with or in the management of the sacred fire and the Atash Behram buildings, properties, income, &c., otherwise than as shown in the first relief (a) granted to the plaintiffs.

The defendants do bear their own costs and do pay the costs of the plaintiffs.

The defendants appealed.

Inverarity (and *Lowndes*, with *Nanu* and *Hormusji*), for the appellants (defendants):—We contend that the property mentioned in paragraph 1 of the plaint does not vest in the Parsi community of Udwada and the nine priestly families are not the delegates of the Anjuman. We disclaim any right over the ceremonial portion of the temple work. What we claim is that the land and the buildings are vested in us as well as the right to manage them. We have a right to take precautions for the protection of the valuables in the temple.

The next question is whether the sacred fire is the subject of ownership. Our case is that if it belongs to anybody, it belongs to the whole Parsi community at large. The Iran Shah is not a judicial person in the sense in which a Hindu idol is considered to be so. We do not dispute and never have disputed that the nine priestly families are the only persons entitled to officiate at the fire and to take the offerings and perquisites generally offered for the performance of ceremonies in the temple.

[JENKINS, C. J.:—The plaintiffs' main contention refers to the closing of the door in the compound wall.]

Sir Dinsha Petit built the Dareh Meher. His trustees really wish it to be declared that the wall belonged to him and they have put forward the plaintiffs to do so. Motlibai, when she rebuilt the fire temple, purchased certain lands and made additions to the temple. Thereupon the heirs of Dadabhai, who were in management of the temple property, transferred all the rights which Dadabhai possessed to Motlibai and thenceforward she continued the management till she made the trust-deed. Motlibai did not make a gift in favour of any one of the lands she purchased. Supposing she had become insolvent before she made the trust-deed of 1896, the property would have passed to the Official Assignee. The dedication by Motlibai was to the whole Zoroastrian community and not only to the community at Udwarda. The very fact that she appointed the trustees shows that she had reserved her proprietary rights over the temple as founder and did not intend to make a gift to any one. We contend that the property all along vested in Motlibai and there was nothing to prevent her from taking it back: *Doe d. Howard v. Pestonji*.⁽¹⁾ Having regard to the provisions of the Transfer of Property Act, which is applicable to the case, Motlibai could not make a gift of the property except by a registered deed, and that being wanting, the ownership remained in her. In any event Motlibai had reserved her rights as founder and she was entitled to make any arrangement she chose with respect to the property.

[JENKINS, C. J.:—But not so as to nullify the object of the trust.]

If what we have done is inconsistent with the trust-deed, then the Advocate General would be a necessary party to the suit. The plaintiffs' chief complaint is that they are put to great inconvenience on account of the closing of the door. This is a matter of detail which the Court cannot go into. (Documentary evidence discussed). There is no documentary evidence that the Anjuman or its committee ever interfered in the management of the building. The only evidence is that after the formation of the committee some rules were framed relating entirely to the

1903.

NAYROJI
MANEKJI
WADIA

2.

DASTUR
KHARSEDDJI
MANCHERRJI

(1) (1852) Perry's O. C. 535.

1903.

NAVROJI
MANEKJI
WADIA
v.
DASTUR
KHARSEDJI
MANCHERJI.

ceremonial part of the work. There is no evidence that the holy fire belonged to the Anjuman at Udwada.

[JENKINS, C. J.:—How is it capable of ownership?]

We submit it is not. But if it is, then it belonged to the whole Parsi community at large. The finding of the Judge on this point is repugnant to the feelings of all Parsis. The plaintiffs' case is that they can take the fire wherever they chose. We do not dispute their right to worship the sacred fire and appropriate the offerings. The Judge has confounded the right to the fire and the right to the building.

[JENKINS, C. J.:—We cannot go into these interesting questions. We must look to the cause of action which is the closing of the doors.]

The plaintiffs have claimed a declaration with respect to the doors, but they have not claimed consequential relief. Recently various thefts have occurred, therefore we were justified in closing the doors at night. The plaintiffs want to be free from all control. The following were some of the authorities cited:—59 Geo. III, c. 12, s. 17; Lewin on Trusts, p. 605 (Note); *Doe d. Higgs v. Terry*⁽¹⁾; *Vestry of Bermondsey v. Brown*⁽²⁾; Dart on Vendors and Purchasers, p. 24; *Chilton v. Corporation of London*⁽³⁾; *Lord Rivers v. Adams*.⁽⁴⁾

Scott (Advocate General, and *P. M. Mehta*, with *H. C. Coyaji*, *K. M. Jhaveri*, and *Mulla and Mulla*), for the respondents (plaintiffs):—During the course of the arguments and the discussion of the evidence, the following authorities among others were cited:—West and Buhler, p. 554; *The Advocate General of Bombay v. David Haim*⁽⁵⁾; *Wardens of Nossa Senhora v. Bishop Hartmann*⁽⁶⁾; *Batten v. Gedye*⁽⁷⁾; *Bombay Gazetteer*, Vol. IX, Part II, p. 215.

Lowndes, in reply.

(1) (1835) 4 Ad. & E. 274, 282.

(2) (1866) 1 Eq. Cases 204, 215.

(3) (1878) 4 Ch. D. 735.

(4) (1878) 3 Ex. D. 361.

(5) (1886) 11 Bom. 185.

(6) (1851) Perry's O. C. 333.

(7) (1889) 41 Ch. D. 507.

JENKINS, C. J. :—This suit relates to the Atash Behram or fire-temple of the Parsis at the town of Udwada, in the Pardi Taluka of the Surat District. The plaintiffs are three Parsi inhabitants of that town, and they purport to sue on behalf of themselves and all other Parsi inhabitants of Udwada in accordance with the provisions of section 30 of the Civil Procedure Code, which permits one party to sue on behalf of all in the same interest. The defendants are the trustees of an indenture of settlement, dated the 2nd of September, 1896, executed by Bai Motlibai, now deceased, a benefactress of the Atash Behram. The cause of action alleged is, first, that the defendants, claiming to act under a power contained in the indenture of settlement, on or about the 7th November, 1896, erected a wall and thereby blocked up a door-way in the wall of the compound in which the Atash Behram stands; and secondly, that on the 19th October, 1896, the defendants wrongfully and unjustifiably closed and blocked the two doors in the western wall and one door in the northern wall of the Atash Behram, and have continued to do so every day since, thereby causing great inconvenience to the priests and others engaged in and about the Atash Behram. To appreciate the real character of the suit a short narrative of the temple's history is necessary. It is claimed that it is the oldest Parsi temple in India, and undoubtedly its traditional history points to a considerable antiquity. The Subordinate Judge has given a detailed account, which has been accepted as being substantially a correct exposition of tradition, and it is therefore needless now for us to travel over the same ground. It will suffice to say that the building was erected at Sanjan, and in it was located the sacred fire or Iran Shah constructed by the ancestors of the nine priestly families. This fire has ever been regarded by the Parsi community as an object of veneration and reverence and a symbol of the greatest sanctity. Under stress of circumstances the sacred fire was moved from place to place, and ultimately on the 28th October, 1742, it was brought to Udwada. It was first lodged there in a building given for the purpose; then Bhikaji Edalji, a Parsi from Surat, rebuilt the temple; according to some it was later restored by a Parsi named Gazdar, but as to this there is a difference of opinion: it is, however,

1903.

NAVROJI
MANEKJI
WADIA

v.

DASTUR
KHARSEDJI
MANCHERJI.

1903.

NATROJI
MANEKJI
WADIA
vs.
DASTUR
KHAHSEDDJI
MANCHERJI.

certain that in 1830 Dadabhoy and Mancherji Pestonji Wadia in restoration of the temple then standing erected the building which was re-built by Bai Motlibai in 1894. In the plaint it is alleged that the Atash Behram or fire-temple of the Parsis is, with its site and diverse buildings and appurtenances from time to time dedicated for use in connection therewith, vested in the Parsi inhabitants of the town of Udwada, and they have from time immemorial managed the same and exercised absolute authority in regard to the maintenance and administration thereof as a place of Zoroastrian religious worship and observances, and further that the nine priestly families of the Parsis of Udwada have, as of right and from time immemorial, been special delegates of the Parsi inhabitants of that town for the purpose of supervising and managing the said Atash Behram, and the plaintiffs are members of some of the said nine families. This, then, is the title on which the plaintiffs claim to sue. The defendants, on the other hand, contend that Dadabhoy Pestonji was in 1830 entrusted with the possession and complete management of the temple in return for his having rebuilt, preserved and enlarged the same, and that "the said right of control and management was entrusted to Bai Motlibai in consideration of having entirely rebuilt the temple and added thereto," and that the defendants as the trustees appointed by her have acquired the same right. At the trial of this suit before the Subordinate Judge the following issues were framed:—

1. Do the plaintiffs prove that the fire-temple (Atash Behram) of Udwada is vested in the Parsi inhabitants of that town, and that they or nine priestly families of Udwada as their delegates have from time immemorial exercised absolute authority in regard to the maintenance and administration thereof?
2. Or, as is alleged by the defendants, was one Dadabhai Pestanji of Bombay invested with the management owing to his having rebuilt, preserved and enlarged the fire-temple since so early as 1830, the nine priestly families being simply bound to render services only to the sacred fire? Has Dadabhai Pestanji transferred any of his powers of management to the defendants?
3. How far will the dissent of Beramji Pestanji Bharda affect the plaintiffs' right of management, if any?
4. What rights as to possession and management of Atash Behram came to the lady Bai Motlibai when she reconstructed the Atash Behram and appurtenances at large cost?

5. Was she entitled to confer on trustees (defendants) all the powers including that of making rules and regulations for the due government of the trust premises under the indenture A? How far would the indenture bind all the worshippers at the temple?

6. Is the compound wall, the door-way (E, F in the plan annexed to the plaint) in which is now closed, the property of Atash Behram or part of the adjoining Dare Meher? Have the defendants the right to close the door-way?

7. Can the plaintiffs claim any relief with reference to the wall independently of the trustees of the Dare Meher?

8. Are the plaintiffs entitled to have the door-way E, F kept permanently open by reason either of long usage or any right on the score of inconvenience to worshippers?

9. Does the daily closing of the doors B, C and D between 8 P.M. and 6 A.M. interfere with or cause inconvenience to any religious rites performed by the plaintiffs or by the Parsi worshippers in general?

10. Are the plaintiffs entitled to all or any of the reliefs (a), (b), (c), (d), (e) asked in the plaint?

11. Is the suit bad for non-joinder of Motlibai's heirs?

12. Is it bad in its inception for want of the Advocate General's permission or owing to its being brought in an inappropriate form?

13. Is not the plaint sufficiently valued and stamped for the purposes of the Court-fees?

On these issues the learned Subordinate Judge found as follows:—

My finding on the first issue is that the Atash Behram or the sacred fire called the Iran Shah and the building and other property belonging to it have vested in the Parsi inhabitants of Udwada, and that they, or the nine priestly families of Udwada, as delegates of the Parsi inhabitants of Udwada, have exercised absolute authority in regard to the maintenance and administration thereof from the time when the sacred fire was brought to Udwada.

My finding on the second issue is that Dadabhai Pestonji of Bombay who built the old Atash Behram in 1830 was not invested with the management of the Atash Behram owing to his having built and enlarged the fire-temple; that the nine priestly families were not bound to Dadabhai to render services only to the sacred fire and that the said Dadabhai did not transfer any of his powers of management to the defendants.

My finding on the third issue is that the dissent of defendant Behramji Pestanji Bharda will not affect the plaintiffs' right of management.

My finding on the fourth issue is that when Motlibai constructed the new building she acquired the right of seeing that the fire-temple with the compound and other buildings attached to it, together with the censor and other things placed by her in the fire-temple, were used for the purposes for which they were intended to be used; that the buildings were duly repaired at her cost; that the rites and ceremonies intended to be performed on her behalf and at her cost

1803.

NOVROJI
MANEKJI
WADIA

v.
DASTUR
KHARSEDJI
MANCHERJI

1903.

NAVROJI
MANEKJI
WADIA
v.
DASTUR
KHARSEJI
MANCHERJI.

were duly performed, and that the things that were not intended for daily use were lodged in a room in the fire-temple under safe and proper custody.

My finding on the fifth issue is that Motlibai was entitled to confer on her trustees the rights or powers mentioned above, and that she was not entitled to confer on her trustees the powers of making rules and regulations for the due government of the trust premises, and that the indenture made by her (Exhibit 141) is not binding on the worshippers so far as it confers rights or powers in excess of those possessed by Motlibai herself.

My finding on the sixth issue is that the compound wall in which the door-way E, F belongs to the Darch Meher and that the defendants had no right to block up the door-way.

My finding on the seventh issue is in the affirmative, that is, in favour of the plaintiffs.

My finding on the eighth issue is that the plaintiffs are entitled to have door-way E, F permanently kept open, not by reason of long usage, but under the right acquired by them and on the score of inconvenience to the priests and worshippers.

My finding on the ninth issue is in the affirmative, that is, in favour of the plaintiffs.

My finding on the tenth issue is that the plaintiffs are entitled to obtain the reliefs (a), (b), (c), (d) and (e) as shown in the decretal part of this judgment.

My finding on the eleventh issue is that this suit is not bad for non-joinder of Motlibai's heirs.

My finding on the twelfth issue is that this suit is not bad in its inception for want of the Advocate General's permission or owing to its being brought in an inappropriate form.

My finding on the thirteenth issue is that the plaint is sufficiently valued and stamped for the purposes of the Court-fees.

The suit, however, must be determined by reference to the causes of action alleged in the plaint, and it appears to us that the learned Judge has somewhat gone beyond these limits. As far as we can, we propose to confine ourselves to those matters that arise out of the causes of action alleged. When it is seen what they are, one can readily appreciate the observation of Khan Bahadur Bamanji Behramji (page 122) who says:—"Most of our Parsi community is displeased at the quarrel brought about for this trifling matter by the closing of this door." We sympathise with this view and we can well understand that the Parsi community should view with regret the bitter and costly litigation which the record discloses. But whether it be, as the Advocate General suggested or not, that the true meaning of

This litigation is that it is an endeavour on the part of the 4th defendant (Bharda) to aggrandize his position, using as his tool for that purpose the 1st defendant, Nowroji Wadia, matters not; the parties have declined all suggestion of amicable settlement, and we must endeavour to determine their rights according to law.

1903.

NAVROJI
MANEJI
WADIA
v
DASTUR
KHARSEDJI
MANCHERJI.

We propose then to consider, first, whether the defendants in any way acquired rights which entitled them to do the acts complained of, and if not, then, secondly, whether the plaintiffs have any right to sue in respect thereof.

The defendants' case is that by the deed-of-settlement of the 2nd of September, 1896, "they are fully and properly clothed with authority to make rules and regulations for the efficient and due management of the Atash Behram and all the buildings appurtenant thereto, and that the said Bai Motlibai had power to invest the defendants with such authority—a power inherent in the very conception of the endowment made by her." (Written statement para. 12).

Motlibai, it is argued, by her benefaction became invested with the rights of a founder, and acquired by transmission the rights over the temple and its appurtenances which had previously been in Dadabhai, the restorer who preceded her, and also we presume in all previous restorers of the buildings. In support of this view *Doe d. Howard v. Pestonji*⁽¹⁾ has been cited, but in our opinion that case turned on its own peculiar circumstances and has no application here. According to Dr. Edalji Kharsedji's description of a somewhat excited interview, the defendant, Nowroji Wadia, seems at one time to have advanced even a claim of ownership, for, in the words of this witness, the 4th defendant then began to abuse the Anjuman and said as follows:—"What right have they to *my* Atash Behram? The offerings that are made there are also mine" and beating his breast (*i. e.*, emphatically) he bawled out "mine, mine." Of the terms of the original foundation we have no evidence: it is even uncertain from whom the site of the first building was obtained; for while some of the witnesses depose to a tradition that the spot

(1) (1852) Perry O. C. 535.

1903.

 NAYROJI
 MANEJI
 WADIA
 v.
 DASTUR
 KHARSEDJI
 MANCHERJI.

was given by the Raja of Mandvee, the defendant Bharda denies it (pages 87, 94, 108, 120, 248 and 275 of the printed appeal book).

There is a similar lack of precise information as to the conditions of the subsequent rebuildings, at any rate, until we come to the Wadia restoration of 1830. According to the evidence of Mr. Bamanji Behramji, who appears to have made a special study of Parsi customs and usages, "the man who dedicates the building can look after the building and repair it himself. Any one else can also repair it, as it is thought to be a very pious purpose. If one consecrates the fire himself, he can keep control over the fire also, but this Udwada fire was consecrated by others, and so no one can control it. The person who dedicates a fire temple can see that it is used for the pious purpose for which it is built, and is not used to any other purpose, or is not damaged or injured. Those who built the fire temples at Udwada entrusted them to the Mobeds of the nine families who consecrated the Iran Shah. None of them have kept any rights of ownership over the same after dedicating them to the Iran Shah. This is in reference to the fire temples other than the present one. Motlibai's son Nowroji claims to have some rights over the present fire temple. He can look after the building and repair it, but he cannot do anything else with reference to it. According to our rules of morality, as long as the dedicator wants to repair it he has the preferential right over others. If any one else wants to make any addition to the fire temple with the consent of the Anjuman, he can do so. He cannot control the use of the building by the Mobeds for the religious purposes in any particular way. It is the power of the Mobeds of the nine families, who have kept this sacred fire for so many years, *to control the use of the building*. None of the old donors of the previous fire temples of Udwada controlled the religious ceremonies in reference to the sacred fire. It is the business of the Mobeds who perform the ceremonies there to decide what door is to be closed or kept open and when, and not of the donor of the fire temple. The latter cannot do it." This preferential right of repair thus attributed to a founder corresponds with the usage which, according to Mr. Mandlik, prevails among the Hindus, who allow the same right to the founder and his heirs. But there is no suggestion that Motli-

bai, or even her immediate predecessor in the line of restorers, Dadabhai, was of the line of the first founder or of the restorers prior to him; indeed it is in evidence that the line of one of them, Edalji, has died out.

It is not until we come to Dadabhai's restoration that it can be said there is any evidence of the relations between the rebuilder and the temple. But even here there is no direct record of the terms on which Dadabhai rebuilt; we are invited to infer those terms from the evidence there is on the record of the attitude taken up by Dadabhai in connection with the affairs of the temple.

The documents brought to our notice are numerous, and we will deal with the more important of them in the order of their date. (His Lordship referred to and commented on the following Exhibits:—151, 487, 526, 513, 155, 156, 202, 163, 164, 493, 234, 167, 168, 164, 170, 171, 183, 183, 183, 191, 193, 194, 240, 195, 254, 512, 131, 132, 133, 134, 231, 135, 136, 196, 248, 138, 197, 513, 198, 199, 200, 137, 201, 204, 92, 93, 205, 206, 475, 139, 255, 98, 502, 243, 232, 480, 122, 482, 484, 522, 615, 476, 485, 486, 524, 501, 207, 510, 477, 511, 244, 620, 378, 251, 247, 245, 252, 246, 249, 250, 235, 453, 223, 224, 225, 226, 257, 228, 229, 230).

From this documentary evidence it is clear that Dadabhai rebuilt the temple, and there is no doubt that, as the defence alleges, he did the repairs, whitewashing and tile-turning, and that he supplied fuel, oil, sandalwood and incense; it also is established that he gave directions as to the manner in which the *olla* and other parts of the building were to be used and otherwise intervened in the management of the temple.

But can we from this draw the inference that he was in consideration thereof entrusted with the possession and complete management of the temple and the premises appertaining thereto, and that he thus acquired rights which, being transmitted to Motlibai, enabled her by virtue thereof, and of rights that came into being as the result of her benefaction, to vest in the defendants as her trustees powers and rights which are a justification for the matters complained of in this suit?

Now let us see what Dadabhai's position was; he was not the first founder of the establishment; he did not build exclusively

1903.

 NAVROJI
MANEKJI
WADIA

or

 DASTUR
KHAJESDJI
MANCHERJI.

1903.

NATROJI
MANEKJI
WADIA
v.
DASTUR
KHARSEDJI,
MANCHERJI.

on a site belonging to himself; and Exhibit No. 195, dated the 14th October, 1862, suggests the inference that in rebuilding he to some extent utilized portions of the then existing building. That the temple premises were enlarged on that occasion is probable, but what portion of the present site was then acquired it is impossible to tell. The first question we have to ask ourselves is, whether Dadabhai acquired any rights of property then over that which already formed part of the temple premises. We fail to see how he acquired any ownership. It has been argued before us that the original builder in Udwarda must be assumed to have retained the ownership of the building furnished by him for the habitation of the sacred fire and of the site on which it stood, and that these rights passed to each successive rebuilder. But we can find no warrant for any such assumption.

We know of no such course of transmission or devolution in law, and the circumstances manifestly do not invite the application of those legal principles which operate in favour of one who in mistake is allowed to expend money on the property of another.

True money was spent, but "endowments to the sacred fire are looked upon by the Parsis as acts of great piety" is the testimony of Sir Dinshaw Petit (page 240), and "it is very pious," says Mr. Bamanji Beheramji (page 119), "to offer articles to the fire and dedicate buildings also to it." In the piety, therefore, of the act, and the reward that piety was doubtless expected to attract, we have sufficient motive for the expenditure to absolve us from the obligation of speculating what material return Dadabhai Wadia looked for. It may be that the documentary evidence discloses much that is consistent with the recognition of a complete control in Dadabhai over the temple and its appurtenances, but it does not follow from this that Dadabhai was clothed with legal rights entitling him to intervene to the extent he did. It must be borne in mind how matters stood: here was a wealthy benefactor who had done much for the establishment and from whom more might be expected: was it not but natural that every deference should be paid to his wishes, at any rate so long as they did not in the view of the local establishment conflict with the welfare of the temple and its services? We certainly think so. Moreover, it is to be noted that the control Dadabhai

exercised was until 1863 through the Dastur alone, and that when trustees were appointed the persons selected for that purpose included the Dastur for the time being.

No doubt the Dastur Mancherji was deposed from that position, but even then the trustees were chosen from the community of Udwada.

Now let us examine the events that led up to and are connected with Motlibai's restoration. Dadabhai was dead and his son's means did not permit of his doing the work; so in the first instance it was determined by the Anjuman to raise the requisite funds by an appeal to the Zoroastrian public. The subscription list circulated is Exhibit 114 (page 482) and it is in these terms:—

"As to the large building of the Dare Meher appertaining to the holy Atash Behram Saheb (Iran Sha) of Udwada in which at present Atash Behram Saheb (*i.e.*, Sacred Fire) has been installed, and the building of the Nahankhana Dare Meher opposite the same which is in use at present as to the both these buildings the same were got rebuilt and given by deceased Wadiaji Saheb Seth Dadabhai and Seth Mancherji Pestonji Wahadiaji, inhabitants of Bombay, at their own expense in the Yezdezardi Shehenshai year 1199 (A. D. 1829-30). And a large sum for the necessary expenses in connection with the Atash Behram Saheb such as (the expenses of) sandalwood to be used at the time of performing the *Boi* ceremony in all the five *Gehes*, of daily firewood and of the salary of the Jadukhush Mobed (working) in the Dare Meher and for other expenses has been regularly received every year since the said Yezdezardi Shehenshai year 1199 (A. D. 1829-30) up to this day from them and after their (death) from Seth Meherwanji Dadabhai Wahadiaji, the son of (one of) them. And in order to make all the said expenses in such manner as is settled and in order to look after the said buildings, five worthy persons from the Athornan Anjuman (*i.e.*, community of Parsis belonging to the priestly class) of Udwada have been appointed trustees and (the buildings) have been entrusted under their care to the ownership on the Anjuman (*i.e.*, community). The Anjuman (*i.e.*, community) of Udwada are extremely obliged to the said family, generous at heart and staunch in religion, for the same.

"2. Before the buildings (mentioned) above were got built and presented by Wadiaji Saheb, that is to say, at the time when the band of Sanjana Mobeds (*i.e.*, priests) came for the first time to Udwada along with the Atash Behram Saheb, the deceased Behdin (*i.e.*, Parsi layman), Minocher Bahman of Nargol had, at first, got built and presented one small building and thereafter one Zoroastrian of Surat (namely) the deceased Behdin (*i.e.*, Parsi layman), Bhikaji Edalji, had made additions to and got built and presented the same. The help (given) by those generous persons is fresh in the memory of the Zoroastrian Anjuman (*i.e.*, community) of Udwada.

1933.

NAVROJI
MANEKJI
WADIA
c.
DASTUR
KHARSEDJI
MANCHERJI.

1903.

NOVROJI
MANEKJI
WADIA
v.
DASTUR
KHARSEDJI
MANCHERJI.

" 3. A long period of sixty years has elapsed since both the buildings mentioned above were built. During the said (period) it was necessary to repair them once (or) twice, which was also in accordance with the request of the Anjuman (*i.e.*, community) got done by Wahadiaji Saheb at his own expense.

"Both the buildings (mentioned) above having now become very old have been reduced to a condition which requires thorough repairs. It is absolutely necessary to do the same. Not only that, but if (the buildings) remain in the present condition for a longer time there is, may God not so will, a very great danger of the result being any day very dreadful and sad. Moreover, the Anjuman (*i.e.*, community) perceive with regret that it is not that the work can now be managed by making small repairs as (was done) previously and it is not likely that the necessary work can be done by one hand (person). Therefore the Anjuman (*i.e.*, community) of Udwada having taken the opinion of their kind well-wishers in connection with the said extremely necessary work, honour (accept) the proper and sound advice received from those gentlemen, and depending upon the same make a Tharav (*i.e.*, resolution) that for making repairs anew to both the said buildings, especially to the big Darā Meher (building) appertaining to the Atash Behram Saheb, and for making changes suitable to the present time, a list of subscription should be set on foot on behalf of the Zoroastrian Anjuman (*i.e.*, community) of Udwada; that the said list should be circulated amongst generous and religious Zoroastrian gentlemen and that money is necessary for making repairs to both the buildings should be collected. Moreover, in the above work the respected family of the kind Wahadiaji Saheb should be joined with the Anjuman (*i.e.*, community) and the grateful connection of the said religious family with the Anjuman (*i.e.*, community) of Udwada should be continued for ever.

"The kind Wahadiaji Saheb Merwanji has with great pleasure supported the Tharav (*i.e.*, resolution) of the Anjuman (*i.e.*, community) mentioned above and has shown great pleasure at the proper Tharav (*i.e.*, resolution) of the Anjuman to put up any tablet or writing whatever on the said buildings hereafter just as his deceased patrons (*i.e.*, forefathers) had not deemed it proper to put a tablet or any written token whatever bearing their names at the time they dedicated the said buildings to the Holy Kebla of the Atash Behram Saheb and has accepted with pleasure his association with the Anjuman (*i.e.*, community) in the said extremely useful work of great religious merit. Besides that the Anjuman (*i.e.*, community) of this place had great doubts as to accomplishing this difficult work single-handedly, but on account of the person looking to the said Holy Kebla with a staunch faith, the well-wisher of the Anjuman (*i.e.*, community) of Udwada (namely), the illustrious and generous Setji Saheb Sir Dinshaji Manekji Petit, Baronet Saheb, having, with his usual greatness of heart, promised to give with pleasure every possible succour to the Anjuman (*i.e.*, community) in this work of great religious merit and, moreover, on account of this disinterested and illustrious person (having shown) anxious care on every occasion to make out the very first scheme relating to this work of very great religious merit and to see this work accomplished soon, the Anjuman (*i.e.*, community) had, in the life-

time of their well-wisher and leading member of the deceased respected Seth Sahab Manekji Kawasji Damanvala, under his leadership and by his sound advice and in consultation with him, already set on foot this work and after his unfortunate demise the Anjuman (*i.e.*, community) have continued the said work under the leadership of his son Seth Sorabji Manekji Damanvala and are anxious to see the same now carried out.

"To those who may have subscribed at Bombay a receipt bearing the signature of Seth Nasarwanji Beheramji Secretary will be given in respect of the moneys subscribed towards the said fund that may have been recovered and the said moneys will be kept as a deposit with the trustees of the illustrious Parsi Panchayet of Bombay. In the same manner a receipt bearing the signature of Bhai Behramji Pestonji Iajdiarji Bharda will be given in respect of the moneys recovered at Udwarda and the said moneys will be credited at the firm of the respected Seth Sahab Manekji Kawasji Damanvala, deceased, with Sorabji Manekji Damanvala under his care, and when a sufficient sum has been collected the same will be remitted from that place from time to time for being kept as (mentioned) above with the trustees of the illustrious Parsi Panchayet of Bombay as a deposit, and after a sum sufficient for the said work has been collected the moneys thus deposited will be utilized.

"After giving publicity to the above facts for the information of the religious gentlemen belonging to the Zoroastrian community, the Zoroastrian Anjuman (*i.e.*, community) of Udwarda through the undersigned persons on their behalf most humbly request the Zoroastrian world (community) and entertain an anxious hope that every religious Zoroastrian will give his sympathetic support towards this useful work of religious merit of the first grade (that is) of repairing the holy building of his ancient Kebla, will extend his generous hand and will acquire great religious merit of having given assistance to (the work of repairing) the buildings appertaining to this most ancient Atash Behram Sahab of India." (Commented on.)

Some subscriptions were actually obtained, but ultimately the whole cost of the rebuilding was undertaken by Bai Motlibai. The old building was then pulled down by the Anjuman and sold for Rs. 1,950 (see page 137).

Here it is instructive to follow the documents that passed in reference to the rebuilding by Motlibai. (His Lordship referred to Exhibit 257, 31st January 1903, page 635; Exhibit 124, 22nd April 1893, page 501; Exhibit 123, 31st October 1894, page 499; Exhibit 126, 31st October 1894, page 506; Exhibit 105, 31st October 1894, page 461; Exhibit 188, 20th October 1895, page 514; and Exhibit 137, 26th October 1895, page 512.)

The circumstances under which Bai Motlibai came to rebuild the temple appear from Exhibits 257 and 124. (His Lordship referred to and commented on these Exhibits, pages 635 and 510).

1003

NOVROJI
MANEKJI
WADIA
r.
DASTUR
KHARSEDJI
MANCHERJI.

1902,

NOVROJI
MANECKJI
WADIA
v.
DASTUR
KHARSEDJI
MANCHERJI.

The result was that the rebuilding was carried out by Bai Motlibai, who considerably enlarged the buildings, purchasing for that purpose additional land.

By October the work was completed, and on the 31st of that month the opening ceremony took place. Motlibai on account of her advanced age was unable to be present, but she was represented on the occasion by her two sons, the defendants N. M. Wadia and N. J. Wadia. An address in Motlibai's name, Exhibit 123, was read. (His Lordship referred to it, page 499.)

We find then (1) it was at the request of the Zoroastrian Anjuman of Udwada that Motlibai undertook the work; (2) the old temple is stated to have been *given* by the Wadias; (3) the new building is presented; and (4) the motive of the gift is explained. An address was also read, signed by the head of the Zoroastrian community of Udwada. (His Lordship referred to Exhibit 126, page 506).

On the temple a tablet was placed bearing a Gujarati inscription, of which following is a translation:—

"The Atash Behram Iran Shah of the Shenshahi Zorthosti Anjuman was consecrated at Shri Sanjan by the first band of Zoroastrians who came from Persia to India in the Yezdezardi year. The Athornan (priestly) class at Udwada attends to the same. The first building for the same was got built at Udwada and presented by Behdin Mancherji Bamanji of Nargol in the Yezdezardi year 1112 (A. D. 1742). The said building was extended and built and presented thereafter by Behdin Bhikaji Edulji, an inhabitant of Surat, in the Yezdezardi year 1121 (A. D. 1751). The same was subsequently extended and rebuilt and presented for the third time by Seths Dadabhai and Mancherji Pestanji Wadia, inhabitants of Bombay, in the Yezdezardi year 1199 (A. D. 1829-30). As the building got old it was this fourth and last time built by Bai Motlibai Maneckji Wadia, an inhabitant of Bombay, daughter of the deceased Seth Jehangir Nasarwanji Wadia, for the benefit of the soul of her deceased husband Seth Maneckji Nowroji Wadia, after purchasing some pieces of land (situate) about the same at a total cost of Rs. . . . and given into the possession of the Anjuman through the trustees of Udwada and the holy Iran Shah Atash Behram was installed in the new building on Meher the 16th day of Ardibehesht, the second month of Shehenshahi Kherdad, the third month Kadmi, in Yezdezardi year 1264 (corresponding with the English date the 31st October in the year 1894) and the day of the week. . . .

Mr. Dinsha Dorabji Nistri, N. S. A., Architect."

Here then it is distinctly said that the new building *was given into the possession of the Anjuman*, or into its charge, if we use

the rendering given to similar language in the inscription on Sir Dinshaw Petit's Dare Meher. This language does not point to the retention of any interest or ownership by Motlibai. On the contrary, it is more in harmony with the renunciation essential to the completion of an act of similar piety on the part of a Hindu benefactor.

On the 20th October, 1895, certain Parsi priests of Udwada addressed to Bai Motlibai a document, Exhibit 128 (page 514), in which they speak of the obligation conferred by her on them "by getting a new building built and by *presenting* (the same to us)." The memorial goes on to complain of the conduct of the Udwada committee in placing padlocks and erecting a tablet without taking the opinion of the Anjuman and that the inscription on the tablet was incorrect. It then states that they had given the old building into the charge of Motlibai without a tablet or inscription, and that they should receive it back in the same manner.

To this Motlibai wrote, as a reply, Exhibit 127:—

To Mobed Bhikhaji Diniarji Oonwalla and other Signatories at Udwada.

Written from Bombay by Bai Motlibai, daughter of Jehangirji Nasarwanji Wadiaji, whose blessings be pleased to read. To wit:—As to the memorial written by you Mobeds on Roj the 5th, Maha the 2nd in the Yezdezerdi year 1265 (20th October 1895) I have received the same. In it you have written to the effect that there are some defects in the Atash Behram Sahab premises and the Nahanakhana and (other) premises appertaining to the same at Udwada built by me and you have stated to remove them when they are repaired again. About this I state that I shall do as it pleases me. The Mobeds should not interfere with me in the matter.

And you write further that the old building was entrusted to your Anjuman (community). That statement of yours is quite false. The old building was entrusted to me by the owner thereof Wadiaji Merwanji, who was my relation through his trustees. And it was only after a special condition was made to put up inscription slabs and to build as I like that I consented to get these premises built. And just as Wadiaji Merwanji gave the old premises to the Anjuman through his trustees in the same way I shall make arrangement to give the new premises also through trustees of my selection. There is nothing new therein.

Re the Na(ha)nakhana premises you write in the present memorial that they are built too far on the rear. But I have seen them personally. The same have been approved of by all.

The compound wall of these premises remains to be built. I shall consult my engineer in connection with this and other works. The Dasturs and (other)

1903.

NAVROJI
MANEKJI
WADIA
&
DASTUR
KHARSEDJI
MANCHERJI

1903.

NAVROJI
MANEKJI
WADIA
v.
DASTUR
KHARSETJI
MANCHERJI.

leading persons at Udwada are more desirous than you are to preserve the privacy of the premises. This is my firm conviction.

Some Mobeds of Udwada who are wanting in sense act improperly in connection with my premises which you even praise and with the Mobeds who perform ceremonies therein. Likewise they wrongly find fault with the service of the sacred Kebla (Fire) which is the very essence of their life and hurt the feelings of those who come from up-country. I am sorry to note this.

But it does not become you poor Mobeds to do so. If you work peacefully and harmoniously you will get your livelihood. And the Zoroastrian who come over to your quarter being pleased you will derive benefit.

And I shall (make) and carry on arrangements in connection with my new premises as it pleases me or I shall get the same made. Please note that. At present this is the only representation.

Dated at Bombay the 26th October in the year 1895.

Please to read the wishes of Motlibai.

On the 2nd of September, 1896, the trust-deed on which the defendants' trustees rely was executed. The parties to it were Bai Motlibai of the one part and the defendants Nowroji M. Wadia, Nusserwanji Wadia, and the defendants Kawayji Kharsetji Jamsetji (now known as Sir Jamsetji Jijibhai), Jeejeebhoy Merwanji Wadia and Byramji Pestonji Bharda of the other part.

Thereby Motlibai conveyed to the trustees the premises described in the first schedule thereto upon trust "at all times to permit the same to be used as a place for public worship by all persons of the Zoroastrian Faith and for the celebration of all rites and ceremonies of the Zoroastrian religion as hitherto observed." It was further declared that the trustees should stand possessed of the securities therein specified, amounting in nominal value to Rs. 61,000, upon the trusts therein declared. And it was thereby further agreed and declared that it should be lawful for the trustees to frame rules and regulations for the due government of the trust premises with power from time to time to rescind or alter the same and the rules for the time being, and, if thought necessary, to substitute new rules and regulations in lieu thereof.

It is by virtue of the powers thus expressed to be vested in them by this deed that the defendants justify their action in the matters of which complaint is made in this suit. The words of the deed are no doubt wide, but even if they were wide enough to cover what has been done, was it within Motlibai's authority

to vest her trustees with those powers? It is, we think, clear that Motlibai's rights could not be increased by any provision contained in that deed; she and her trustees alone were parties; the Anjuman was neither directly or indirectly a party to it, so that so far as it had any rights in the temple it clearly could not be affected. Motlibai's rights, if any, were such as arose from the expenditure incurred by her in connection with the rebuilding of the temple. But what were those rights? There can be no question that when one expends money on the land of another, rights even of ownership may thereby arise in his favour; but for this result certain well-defined conditions must be established, which are absent in this case.

Motlibai knew that the land on which she built was in part at any rate not hers, nor can we see that the Anjuman of Udwada at any time acted in such a way as to encourage in her the belief that she would acquire such rights as would entitle her or any one claiming under her to do that of which the plaintiffs complain. We would even go further and say that the evidence does not satisfy us that Motlibai ever entertained the belief at the time when she undertook the work that she would acquire the rights that are now set up. It is true that she has spent a very considerable sum of money in connection with the temple, but it appears to us that the reasonable inference to draw under the circumstances is that she incurred that expenditure, not in the belief that she was thereby going to gain any proprietary rights or temporal advantage, but that she looked for her reward in the religious merit of the act performed by her, and that appears to us to be a sufficient explanation of her action. It may be that she expected that she and those claiming under her would become entitled to a preferential right to effect any repairs or any restoration that might become necessary, but that is far short of what is now claimed by the trustees.

Now let us for a moment examine somewhat more closely what precisely it is that the defendants have done. In the first place, then, they have built a wall on a part of the temple premises, forming no part of the temple itself. The site of this wall according to the evidence never vested in Motlibai or her trustees, nor is it shown, if that be material, that it ever vested in Dadabhai.

1908.

NAVROJI
MANEKJI
WADIA

v.

DASTUR
KHARSEDJI
MANCHERJI.

1903.

NAVROJI
MANEKJI
WADIA
v.
DASTUR
KHARSEDJI
MANCHERJI.

This wall obstructs the passage between the temple and the Dare Meher, which had been in existence from a time prior to any expenditure by Motlibai; it was in fact a disturbance of the state of things existing at the time when Motlibai came on the scene. Though the inconvenience caused by this interruption of the means of communication between the two premises may not be of great moment, still it is an interruption, and is the cause of some inconvenience, and we fail to see what right the trustees had thus to build on property not vested in them. In our opinion it affords no sufficient justification for their action to suggest that it was a necessary precaution for the purpose of protecting the Atash Behram from the petty thefts, of which we have been told, or of preventing the acquisition of right of way, a suggestion that probably owes its origin to the ingenuity of those who have been entrusted with the conduct of the defendants' case. Had the object been to secure the Atash Behram against either of these suggested perils, then the end could have been secured by less drastic methods than those actually adopted. Therefore we hold that the trustees were not justified in erecting the wall in respect of which relief is sought.

Then how do matters stand in relation to the doors which have been closed by the defendants? They are three in number and all afford means of access into the temple. One is in that part of the outer wall of the temple which stands on the site of the old temple wall; the other two are in the wall which stands on property acquired by Motlibai and form no part of the old temple premises. The first of these doors has been throughout referred to as B, the other two as C and D, and we will continue this mode of reference.

We will first deal with B: it is at night time the only means of access from the temple to the well at the south-west corner of the temple compound, and this has been conceded before us by counsel for the defendants in the course of the argument. In the old temple there was a door similarly placed by means of which those officiating in the temple had access to this well. What right then had the trustees to lock the door B and thus interfere with this established means of access? This part of the temple premises was not vested in them, so that they cannot

claim to have done it by right of legal ownership. The free and uninterrupted use of this door seems to us to be necessary for the enjoyment of the temple and its premises in the manner in which the temple has been always enjoyed, and we cannot see that the trustees had any right to disturb that enjoyment. Their rights must be measured by what is required to safeguard the interest of Motlibai and her heirs, and what has been done by them in reference to the door is, in our opinion, in excess of that and therefore unjustified.

The legal position of the other two doors is somewhat different, for the part of the building in which they are stands on land acquired by Motlibai, and conveyed by her to her trustees. But though they stand outside the limits of the old temple site, they do form an integral part of the temple, the privilege of building which was entrusted by the Anjuman to Motlibai. This lady restored the temple as one entire building without distinction as far as one can see between one part and the rest; these two doors were placed in the temple as rebuilt by Bai Motlibai, and presumably were so placed as being necessary to its full and proper enjoyment. No adequate reason has been placed before us in justification of the obstruction, and it appears to us that the defendants' conduct with regard to these two doors has been wrongful.

So it now must be seen whether the plaintiffs are entitled to maintain this suit.

The first argument urged on this point for the defence is that the suit is based on ownership, and that a fluctuating body of persons, such as the plaintiffs claim to represent in this suit, is incapable of property. We are not prepared to assent to the proposition that in this country a body such as we have represented before us is incapable of property, for even if we pass by the alleged ownership of property by a caste as not being definitely established, there can be no doubt that the village community is capable of property, and in Yajñavalkya we have a distinct recognition of ownership by a fluctuating body, for in Chapter II, v. 187, it is said: "whoever appropriates what belongs to the community.....shall be made to forfeit his property and be banished the realm." The commentary in the Mitakshara on

1903.

NATROJI
MANERJI
WADIA
v.
DASTUR
KHARSEDJI
MANCHERJI.

1903.

NAVROJI
MANEKJI
WADIA

v.

DASTUR
KHARSEDJI
MANOCHERJI.

this verse is, "whoever appropriates what belongs to the community, *i.e.*, anything which is the common property of all the villagers collectively and the like bodies." We take this passage from the Mitakshara Vyavahara Adhyaya translated by Mr. Girish Chandra Tarkalankar. Moreover, that property may belong to a village is recognized in the Judgment of the Privy Council in *Sivaraman Chetti v. Muthaya Chetti*.⁽¹⁾ But it really is unnecessary to go into this question because it is a mistake to say that the suit is based on ownership alone; from the plaint it is clear this is not so. As we have already pointed out, the allegation in the plaint is not only that the Atash Behram is vested in the Parsi inhabitants of Udwarda, but that they have from time immemorial managed the same and exercised absolute authority in regard to the maintenance and administration thereof as a place of Zoroastrian religious worship and observances (paragraph 1).

It is further alleged that the nine families of the Parsis of Udwarda have as of right and from time immemorial been the special delegates of the Parsi inhabitants of that town for the purpose of supervising and managing the Atash Behram and the plaintiffs are members of some of the said families.

The point therefore for our determination is whether these allegations do not disclose a sufficient interest to support this suit, and, if so, whether they have been established. In considering the sufficiency of the allegations regard must be had to the character of the suit and to the interests involved and the legal position of those concerned in the litigation.

It apparently is opposed to the notions of the Parsi community that the Iran Shah should be regarded as capable of, or the subject of, ownership; but even if there be difficulty or doubt as to its ownership, it is obvious that there must be some one entitled to protect from improper invasion that, which for brevity, we will call the temple property, and it appears to us that those who can predicate of themselves that they have exercised the management, authority and supervision alleged in the plaint are so entitled.

The Parsi inhabitants of Udwada are, in accordance with a well known usage which prevails in the community, referred to as the Anjuman of that town. The word Anjuman, according to Wilson's glossary, means among Parsis a constituted council or assembly to which all questions regarding their peculiar customs are referred. Now we have evidence in this case of the existence of an Anjuman as an established institution in connection with this Atash Behram as far back as 1831, for on the 31st of January in that year the two Dasturs "on behalf of the Anjuman on behalf of the Atash Behram Saheb of Udepore purchased a Moglai Huq."

On this circumstance the criticism has been passed that it is uncertain what this Anjuman was; whether it consisted of the whole Parsi community, or of the Parsis of Udwada, or of the Mobeds of that town. Be that as it may, it is sufficient for the present purpose that there was as far back as 1831 a distinct recognition of an Anjuman in connection with the Atash Behram at Udwada.

Then in 1843 a letter (Exhibit 107) was addressed to the Dasturs and "*the whole of the Anjuman*" in relation to a gift of utensils to the Dare Meher of the temple.

In 1860 a document, Exhibit 613, was passed, which records an explanation demanded of the Dastur by the *Udwada Anjuman*, and his reply, and an agreement made thereon. Throughout this document the Anjuman is treated as a body capable of action and it is clear that it included both Mobeds and laymen of Udwada.

In 1863 the Dasturs and Mobeds and Behedins, the servants of the Atash Behram Saheb of Shri Udepore, having in *Samast Anjuman* assembled appointed a committee of 16 with a President and vested them with the authorities expressed in Exhibit 92. The Anjuman is thereby recognized as a Panchayet in connection with the Atash Behram, and this implies the existence of a defined body with rights of supervision (His Lordship referred to the document).

By way of comment on this document it has been said that it is concerned with ceremonial rules and regulations and not with property; but conceding that, its importance is that it is a

1903.

NAVROJI
MANEKJI
WADIA
c.
DASTUR
KHAHSEDDJI
MANCHERJI.

1903.

NAVROJI
MANEKJI
WADIA
v.
DASTUR
KHARSEDJI
MANCHERJI

record of an act done by the *Anjuman of Udwada* in relation to the Atash Behram, and is an instance of action taken by that *Anjuman* as a recognized body comprising both Mobeds and Behedins. In 1863 Dadabhai addressed a letter, Exhibit 132, to the "*Sahebs of the whole Anjuman at Udwada*" asking that assistance might be given by that body to the trustees appointed by him.

Then in Exhibit 274 we have a khata of the *Udwada Anjuman*, while Exhibit 460 is an account of the expense of tinning the Panchayet utensils, showing that the *Anjuman* was regarded as owning them. On the 1st of February, 1883, a letter (Exhibit 230) was written by Manekji Kavasji to certain individuals, including a Behedin as well as Mobeds, whom he addresses as "the headmen of the *Zoroastrian Anjuman of Udwada*." In the letter the *Anjuman* is referred to as a distinct body and it is said that it would be laid under a great obligation by the starting of a fund for the expenses of fuel, &c., in connection with the Atash Behram.

On the 27th of February, 1888, a document, Exhibit 116, was addressed to Sir Dinshaw Petit, and among the signatories was the fourth defendant. The subject-matter of the letter is Sir Dinshaw's proposal to erect a new building for the performance of religious ceremonial, and in this connection reference is made to the *Anjuman* as affected by Sir Dinshaw's benefaction. On the 14th of July, 1890, there was issued "an appeal to the gentry and the general public of the Zoroastrian community in connection with the holy Atash Behram Saheb of Udwada" and among the signatories is the fourth defendant. This document (Exhibit 114), in giving a brief history of the case, states that "in order to look after the said buildings five worthy persons from out of the *Athornan Anjuman* of Udwada have been appointed trustees and (the buildings) have been entrusted under their care to the ownership of the *Anjuman*. The *Anjuman of Udwada* are extremely obliged to the said family, generous at heart and staunch in religion, for the same."

Exhibit 115, dated the 10th of March, 1890, is the record of the resolution passed by the "Dasturs, Mobeds and Behdins, servants of the Atash Behram Saheb at Udwada in *Samast*

Anjuman, that is, Panchayet assembled." In the resolution reference is made both to Behdins and Mobeds and at page 491 we have a distinction drawn between the Athornan Anjuman and the Behdin Anjuman.

As being also relevant to the status of the *Anjuman* at Udwada we have been referred to communications that have passed between Sir Dinshaw Petit and the Anjuman in relation to the Dare Meher (see Exhibit 264, 3rd June, 1891, Exhibit 265, 21st August, 1891, Exhibit 266, 17th August, 1891, Exhibit 267, 1st September, 1893, Exhibit 268, 13th September, 1893, Exhibit 269, 25th April, 1894, Exhibit 270, 9th June, 1894, Exhibit 263, 23rd November, 1894). These documents leave no doubt that Sir Dinshaw Petit, a very influential member of the Parsi community, regarded the Anjuman as a body capable of taking charge of the Dare Meher erected by him, and he acts on that footing.

The same idea is to be found in the tablet placed by him in the Dare Meher (Exhibit 471).

Then again the existence of the Anjuman as a body concerned with the Atash Behram is recognized in the letter written by Merwanji to Motlibai on the 31st of January, 1891 (Exhibit 123), and by Motlibai herself in the document, Exhibit 123, read on the occasion of the consecration of the buildings erected by her, and the same view is asserted in the documents, Exhibits 124 and 125, written to Motlibai and her sons.

The inference then that we draw from these materials and on a careful consideration of the whole evidence in the case is, that the Anjuman was the body that really was vested with the control, management and supervision of the Atash Behram and all that appertained to it.

But then it is said that even if that be so we have not that Anjuman before us as plaintiffs; for that body was not made up of the Parsi inhabitants of Udwada; that it consisted either of the whole of the Parsi community in India, or of those inhabitants of Udwada who belonged to the priestly families. But we are clearly of opinion that the first of these contentions cannot be supported; the Anjuman which consists of the whole of the Parsis in India is known by the name of Kulle Anjuman, and we can find nothing in the evidence which leads to the conclusion that

1903.

 NAVROJI
MANEKJI
WADIA

 D.
DASTUR
KHARSIDJI
• MANCHERJI.

1903.

NATROJI
MANEKJI
WADIA

v.
DASTUR
KHARSEDJI
MANCHERJI.

the Anjuman vested with the control comprised the whole Parsi community.

It only remains to deal with the argument that the Anjuman mentioned in the evidence consists of the members of the nine priestly families of Udwada. There is nothing antecedently improbable in this view; but in fact we find that, whatever may originally have been the case, the priestly families have themselves now recognized the laymen of Udwada as members with them of the managing Anjuman. Even in this suit we find that the plaintiffs, though members of the priestly families, purport to sue on behalf of the laymen as well as of the priests, and we have a complete recognition of the propriety of this view in the unanimous resolution passed by the Parsi inhabitants of Udwada to which we will later refer.

Even if the defendants' contention on this head had been well founded, it would not have helped them, for we think the narrower community for which they argue is completely represented in this suit. We therefore hold that we have before the Court plaintiffs who are competent to sue in respect of the causes of action on which this suit is based.

But then it is objected that the suit must fail, for the plaintiffs have not obtained the consent of the Advocate General as required by section 539 of the Civil Procedure Code. But with regard to the wall and door B it seems to us that this argument must clearly fail, for in regard to them it cannot be said that even the legal property is in the defendants. It is urged however that this answer does not apply to doors C and D: but assuming this to be so, we think the objection cannot be sustained.

The suit in respect even of these doors is not, in our opinion, one which arises out of a breach of trust so as to be within the mischief of the section. It is a suit for the vindication of the right of management which was vested in and actually being exercised by the plaintiffs and those they represent at the date of the obstruction, and it does not appear to us that the suit falls within section 539 merely because those who cause the obstruction happen to have been nominated as trustees by Motlibai.

Before coming to the actual relief to be granted there is one more matter to be considered. The second of the grounds of

appeal to this Court is "that the Judge of the lower Court erred in refusing to hear or excluding evidence which the defendants proposed to give in support of their case."

Having regard to the inordinate volume of the evidence and the length of the trial, we can well understand the reluctance of the Judge to give any further opportunity to the parties of protracting still further this unfortunate litigation. Still if there be evidence that the defendants were entitled to adduce and it was improperly excluded, their objection must prevail. Mr. Inverarity was asked to formulate the points on which he desired to call evidence, and he thereupon mentioned the following:—

1. The acquisition of the site of the Patel's wall by Dadabhai.
2. Parsi usage as to the management of temple.
3. The points (a) to (h) in paragraph 6 of Exhibit 542.*

* Exhibit 542, paragraph 6, points (a) to (h):

We, the defendants in the above case, beg to state as follows:—

(6) On behalf of the plaintiffs, matters recited hereinbelow in sub-paragraphs have been stated, and along with others they have been considered to be material and witnesses examined on them, and papers presented in respect of them.

(a) The Sacred Fire of Udwarda is of the ownership of the nine Sanjan Mobed families of the village, and they have a right to remove it whenever they like.

(b) The building in dispute and much of the costly furniture in it, over which the late Motlibai Sahab has spent lakhs of rupees, as well as the Daroh Meher building of Sir Dinshaji, have been dedicated to the Sacred Fire belonging to them, and therefore those two buildings, together with the furniture therein, have also come into the ownership of those nine families.

(c) The late Motlibai Sahab has given over the new Atash Behram building, together with the costly furniture therein, to the Mobed Anjuman of the village, and, therefore no right of either Motlibai or her Trustees subsists over it, and the trust-deed is invalid to that extent.

(d) The Udwarda Anjuman has given full authority to the present plaintiffs, and so they have the power to bring this suit.

(e) The door in dispute, which was placed in accordance with the desire of the Anjuman, could not have been closed by persons without authority like us, the defendants.

(f) Great inconvenience is caused to the Mobeds who perform the ceremonies and the persons who come to pay their respects by closing of the door.

(g) Mobeds of the nine families have the right to sell off, whenever they like, articles worth thousands of rupees, placed in the Atash Behram for special use.

(h) The usage is that the Mobeds performing ceremonies in all the Parsi religious buildings in India, have the authority to determine how such buildings are to be used

1903.

NAVROJI
MANEKJI
WADIA

v.
DASTUR
KHARSEDJI
MANOHERJI,

1908.

NAYROJI
MANEKJI
WADIA
v.
DASTUR
KHARSEDJI
MANCHERJI.

But the ownership of the site of the Patel's wall is immaterial, and we have expressed no positive opinion on it; and further evidence as to the custom at other Atash Behrams was, we think, properly excluded.

Of the several points named in Exhibit 542 we think (a) does not arise in this suit; (b) is not the plaintiffs' case; (c) raises a question of law on which no evidence is therefore necessary; (d) no evidence is required on this point, and even if it had been, it has now become unnecessary in consequence of the meeting at Udwarda which has been recently held; (e) this is a question for argument: no further facts are necessary; (f) this point is to be determined by inference from the facts proved; (g) this point does not arise; (h) it would not be right to send back the case for further evidence on this point.

There is a reference in paragraph 6 to various other minor particulars, but counsel for the defendants, though challenged to do so, was unable to specify any other than those with which we have already dealt. We think, therefore, that the second ground of appeal cannot be sustained.

This brings us to the question whether any and what relief should be given to the plaintiffs in this suit; and here it becomes necessary first to refer to a meeting of the Parsi inhabitants of Udwarda held under the direction of the Court after the conclusion of the arguments.

It was intimated before us that if the result of this suit were adverse to the defendants, steps would probably be taken to set aside the trusts of the Rs. 61,000 on the ground that in disputing the control which the deed of settlement purported to vest in the trustees, there had been an election against the deed. As this possibly involved risks to the community, on which it had not

and how are the ceremonies to be performed therein. It does not rest with him who builds the building.

The above and various other minor particulars have been brought in by the plaintiffs in this suit, and they have tried to furnish proofs for the same, but we, defendants, say that these statements of the plaintiffs are entirely wrong, and over and above that some of the Mobeds are thinking of removing the Sacred Fire from the building built by the late Bai Motlibai at the expense of lakhs of rupees. We have got very strong evidence to convince the Court in this behalf, and we, thinking it to be very material, are ready to put it before the Court.

had an opportunity of forming or expressing an opinion, we considered it advisable that the matter should be placed before a duly convened meeting of the Parsi inhabitants of Udwada, and the result has been that unanimous resolutions have been passed substantially in favour of the suit notwithstanding the risk involved.

The report of this meeting has been recorded and no exception has been taken to it; and the report shows that there was no objection by any one at the meeting to the participation of the Behedins in the matter.

And now we come to deal with the relief to which the plaintiffs are entitled in this suit. The relief sought in paragraph (a) of the prayer to the plaint appears to us to go beyond what is required by the cause of action alleged and cannot be properly granted in this suit. In paragraph (b) the plaintiffs ask for a declaration that the blocking up of the doorway E, F and the closing at night of the doors B, C and D were wrongful acts and not justified by any right or power vested in the defendants either under the indenture of settlement or otherwise, and to this we think they are entitled. Then it is asked that the defendants be enjoined to remove the wall built by them across the door-way; but we think that relief is inappropriate seeing that in our opinion the defendants as trustees have no rights in respect of that wall or its site: to give this relief would be like granting a mandatory injunction against a trespasser compelling him to come on the land on which he had trespassed to remove an encroachment made thereon by him. We can however enjoin the defendants from closing the doors B, C and D. The relief indicated in paragraph (e) is in our opinion beyond the legitimate scope of the suit. Practically no argument was addressed to us by the Advocate General in support of the relief granted in the lower Court on paragraphs (a) and (e) of the prayer to the plaint and we think the respondents are entitled to their costs of the appeal. The result is that we disallow so much of the decree of the Subordinate Judge as follows directly on the reliefs sought in paragraphs (a) and (e) of the prayer to the plaint and also the injunction granted for the removal of the wall that blocks up the door-way E, F, but in other respects we confirm the decree of the

1903.

NAVROJI
MANEKJI
WADIA2.
DASTUR
KHAISEDJ
MANCHERJI.

1903.

NAVROJI
MANEKJI
WADIA
v.
DASTUR
KHARSEDJI
MANCHERJI.

Subordinate Judge with costs as above indicated, so that the respondents will be entitled to their declaration in respect of the blocking up of the door-way E, F and the closing at night of the doors B, C and D, and an injunction against the closing of the doors B, C and D.

Decree varied.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Jacob.

1903.
July 30.

SHANKARRAO GANGADHAR AND OTHERS (ORIGINAL PLAINTIFFS),
APPELLANTS, v. RAMJI HARJIVAN (ORIGINAL DEFENDANT),
RESPONDENT.*

*Evidence Act (I of 1872), section 47—Document—Handwriting—Proof—
Witness proving handwriting.*

In proof of a document a witness stated that he was acquainted with the handwriting of the writer, but he was not asked in examination-in-chief any question which would elicit any of the several matters indicated in the explanation to section 47 of the Indian Evidence Act (I of 1872). The witness was not cross-examined on the point.

Held, that the law on the point is correctly stated in Taylor on Evidence to be as follows:—

“A witness need not state in the first instance how he knows the handwriting, since it is the duty of the opposite party to explore on cross-examination the sources of his knowledge, if he be dissatisfied with the testimony as it stands.”

It is within the power of the presiding Judge and often may be desirable to permit the opposing advocate to intervene and cross-examine so that the Court may at that stage be in a position to come to definite conclusion on adequate materials as to the proof of the handwriting.

SECOND appeal from the decision of J. E. Modi, Additional First Class Subordinate Judge of Thána, with Appellate Powers, reversing the decree of B. S. Joshi, Subordinate Judge of Mahád.

The plaintiffs sued to recover from the defendant Rs. 4 for rent of the piece of ground in suit, situate in the *Khoti* village of Nagaum in the Mahad Taluka, for the *Shaka* year 1820 (1898-99), together with interest at 12 annas per cent. per month

* Second Appeal No. 672 of 1902.

from the date of suit till recovery, alleging that the ground underneath the defendant's house belonged to them together with trees, stones, &c., and that the defendant had taken up the said ground for occupation from them on agreement to pay Rs. 4 per annum for rent.

The defendant contended that the ground for which the plaintiffs claimed rent was not their property; that he never agreed to pay any rent to plaintiffs for that ground, nor did he execute any rent-note for it in their favour; that the claim was time-barred and that the ground was his ancestral property and the house in which he had been dwelling had been standing on it for upwards of sixty years.

The Subordinate Judge found that the plaintiffs were the owners of the lands; that the agreement for the payment of the rent was proved, and that the claim was within time. He therefore allowed the claim. At the hearing the plaintiffs in support of their case produced several statements of accounts and other papers, the earliest of which was dated 1839. Among those statements of accounts, there were two, namely, Exhibits 68 and 69, with respect to which the Subordinate Judge observed as follows:—

The statements for the *Shake* years 1798 and 1799 (1876-77, 1877-78) are proved to be in the handwriting of Sadashiv Vishvanath Khare, the then agent of the plaintiffs, by the evidence of Govind Ramchandra, and contain an entry of Rs. 4 as for rent received from the defendant.

On appeal by the defendant the Judge found that the defendant was not plaintiffs' tenant. He therefore reversed the decree and dismissed the suit. The following are extracts from his judgment:—

The defendant says that all the documents produced are forgeries. This is rather too sweeping a statement and of course difficult to prove. . . .

The papers, Exhibits 64 to 74, are proved by the witness Govind Ramchandra (41) who has no personal knowledge of the facts in dispute.

These papers may be classified as written by Vishnu, brother of the witness Govind (41); by Pandurang, uncle of the witness Govind; but not by Ramchandra, father of the witness; by Sadashiv Paranjpe and by Vishvanath Sadashiv.

1903.

SHANKARRAO

v.
RAMJI.

1903.

SHANKARRAO
v.
RAMJI.

Exhibits 64 and 65 are by Vishnu's hand; Exhibit 67 by Pandurang; Exhibits 70 to 74 by Vishnu and Pandurang; Exhibit 66 by Sadashiv; Exhibits 68 and 69 by Vishvanath.

The witness Govind says that his brother Vishnu was the plaintiffs' agent to manage this village. Vishvanath Khare was another manager.

Now the defendant's pleader objects under section 47, Evidence Act, that the opinion of this witness, Govind (41), is not relevant. The witness is made to say that he knows the handwriting of these persons and then he identifies the writings. The defendant contends that the section requires to be read as a whole and the witness must say that he has seen the person writing or that he received documents written by him in answer to his own letters or that he has seen, habitually in the ordinary course of business, documents written by the persons concerned. Unless the witness first swears to these conditions of his competency, he is not a person acquainted with the handwriting of the absent person, and his opinion is not admissible. I think there is much force in this argument. I do not agree with the other side when it is contended that it is enough if the witness says that he is acquainted with the disputed handwriting and that it is for the other side to cross-examine the witness and to show that he is not a competent witness. I think the explanation is a sort of a definition, and the original compendious expression is used in the first part merely for the sake of brevity and convenience and that the witness must be first shown to be a competent one by proving his acquaintance and then only is his opinion relevant.

This witness says that his father was the manager and also his brother Hari Ramchandra was the manager. Exhibits 64 and 65 are written by the hand of this Hari. These alone can be relevant under section 32, clauses (2) and (3) of the Evidence Act. The Exhibits 68 and 69 written by the manager Vishvanath Khare may be similarly relevant; but I cannot say that the Exhibits 66, 67, 70 to 74 written by persons not the managers can be in any way relevant under section 32, Evidence Act. The writers Sadashiv and Pandurang and Vishnu did not write them in the course of any business of theirs; nor is it shown that they wrote it in the course of the management by the managers. Vishnu and Pandurang may be closely related to the managers; but it must be shown how these papers came to be written by persons not the managers. Under clause (3) of section 32, it may be said that these persons not being in any way bound to the landlord, not being his managers, do not by this statement incur any pecuniary responsibility. So the only relevant documents are Exhibits 64, 65, 68 and 69.

Exhibit 64 is dated *Shake* 1780 (A.D. 1858) and says that rent for a shop was received from Harjivan Gujar, the father of the defendant. Exhibit 65 is dated *Shake* 1773 (A.D. 1851), and says rent Rs. 4 was received from the Gujar, but there is no name.

Exhibit 68 is dated *Shake* 1798 (A.D. 1876) and names the defendant Ramji Harjivan as having paid Rs. 4 for rent of the site; and Exhibit 69 is dated

1799 (A.D. 1877) and says Rs. 4 were received through or from Govind Harjivan on account of the defendant Ramji's rent.

Both these documents are extremely suspicious in appearance. In Exhibit 69 the figure of Rs. 4 is written over a spot of discoloration in the paper. This spot is the result of old age in a paper. But when the writing is also old the discoloration affects the writing as well as the substance of the paper. The defendant's pleader complains of the ink on Exhibit 68 being a fresh one. I cannot decide that question.

The plaintiffs preferred a second appeal.

P. P. Khare, for the appellants (plaintiffs):—The statements, Exhibits 68 and 69, are similar in nature; therefore, the argument in respect of one would hold good in respect of the other. The Judge took an erroneous view of section 47 of the Evidence Act. The witness Govind was asked whether he knew the handwriting and he answered in the affirmative. It was not necessary for us to question him as to how he knew the handwriting. If the defendant wanted to test the knowledge of the witness, he ought to have cross-examined the witness on the point. The Judge has wrongly put the *onus* on us. The right construction of section 47 and the explanation to the section supports our contention. Exhibits 68 and 69 are not books of account; they are loose sheets of account regularly kept, therefore there can be no objection to their admissibility in evidence.

D. A. Khare, for the respondent (defendant):—The Judge has found that we are not plaintiffs' tenant. This is a finding of fact. Further, Exhibits 68 and 69 are mere scraps of paper which the Judge holds to be extremely suspicious in appearance.

JENKINS, C. J.:—We think the decree of the lower Appellate Court must be affirmed; but we desire to comment on the determination of that Court that the provisions of section 47 of the Evidence Act have not been complied with. In proof of a document a witness stated that he was acquainted with the handwriting of the writer, but he was not asked in examination-in-chief any question which would elicit any of the several matters indicated in the explanation to section 47. There was no objection to this taken at the time nor was the witness afterwards cross-examined on the point. But on appeal the lower Appellate Court considered that the provisions of

1903.

SHANKARRAO
v.
RAMJI.

1903.

SHANKARRAO

v.

RAMJI.

section 47 had not been complied with, and that consequently the document had not been proved. We think this was an error. In Taylor on Evidence, paragraph 1863, the matter is thus dealt with:—"The witness need not state in the first instance how he knows the handwriting, since it is the duty of the opposite party to explore on cross-examination the sources of his knowledge, if he be dissatisfied with the testimony as it stands." It appears to us that this is a correct exposition of the law in this country also, though it is permissible, and may often be expedient, that the matters referred to in the explanation should be elicited on the examination-in-chief. We may here further point out that it is within the power of the presiding Judge and often may be desirable to permit the opposing advocate to intervene and cross-examine so that the Court may at that stage be in a position to come to definite conclusion on adequate materials as to the proof of the handwriting. Though we think the Judge was wrong in the view he took of section 47, still the decree will be confirmed with costs inasmuch as the document was inadmissible on other grounds.

Decree confirmed.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

1903.

August 4,

BHAGCHAND AND RAMCHANDRA (ORIGINAL DEFENDANTS), APPELLANTS, v.
RADHAKISAN MOHANLAL MARWADI (ORIGINAL PLAINTIFF),
RESPONDENT.*

Civil Procedure Code (Act XIV of 1882), section 257 A—Decree—Satisfaction—Sanction of Court—Agreement to pay less than the decretal amount—Void condition in a bond.

On the 4th October, 1897, plaintiff obtained a money decree against defendant for Rs. 529-10-0. In full satisfaction of this decree, defendant on the 3rd June, 1898, executed a mortgage-bond, agreeing to pay Rs. 500 within three months from the date of the bond, and in case the sum were not so paid then to pay interest at Re. 1½ per cent. per mensem until payment:

Held, that so far as the bond provided for the payment of Rs. 500 it was valid as it was for the payment of a sum less than the decretal amount, and

* Second Appeal No. 145 of 1903.

therefore did not fall within the meaning of paragraph 2 of section 257A of the Civil Procedure Code (Act XIV of 1882).

Held, further, that the agreement to pay interest was void under paragraph 2 of section 257A of the Code.

Held, also, that as the agreement to pay interest after the expiration of three months was a separate agreement, it did not affect the right to sue for recovery of the Rs. 500.

SECOND appeal from the decision of Chunilal D. Kavishwar, First Class Subordinate Judge, A. P., at Násik, reversing the decree passed by M. H. Wagle, Subordinate Judge at Málegaon.

Suit to recover money due on a mortgage-bond.

Plaintiff obtained a money decree against defendant 1 on the 4th October, 1897, for Rs. 529-10-0. The decree awarded no further interest. On the 3rd June, 1898, defendant 1 executed a mortgage-bond in favour of plaintiff for Rs. 500, in full satisfaction of the decree. The bond provided that the sum of Rs. 500 should be paid on the expiration of three months from the date of the bond ; and that if the sum were not so paid then the sum should carry interest at the rate of Re. 1-8-0 per cent. per mensem until payment. There was a default in payment. Plaintiff thereupon filed a suit against defendant 1 to recover Rs. 500 as principal and Rs. 262-8-0 as interest due on the mortgage-bond dated the 3rd June, 1898. Defendants 2 and 3 had in the meanwhile purchased the property mortgaged on the 11th April, 1899, and they were added as defendants to the suit.

Defendants contended (*inter alia*) that the bond being in adjustment of the decree required the sanction of the Court, for want of which it was void under paragraph 2 of section 257A of the Civil Procedure Code (Act XIV of 1882).

The Court of first instance held the mortgage-bond proved, but dismissed the claim on the following grounds :—

The next question is whether it is void for want of sanction of the Court. There is no proof that the sanction of the Court was obtained or that the satisfaction of the decree had been duly certified to the Court. Plaintiff has urged that no such sanction was required, as the mortgage-bond was itself the actual and present satisfaction of the judgment-debt, and has cited in support of his contention the recent ruling of the Bombay High Court reported at I. L. R. 25 Bom., page 252.

That case is, in my opinion, distinguishable. The only question before the High Court in that case was whether the agreement embodied in the mortgage-

1903.

BHAGCHAND
v.
RADHAKISAN.

1903.

BHAGCHAND
v.
KADHAKISAN.

bond was an agreement to give time for the satisfaction of the judgment-debt and thus fell under paragraph 1 of the section 257A. The question whether the agreement fell within the second paragraph of the section was expressly omitted. The ruling is therefore not binding if the present mortgage-bond fell within the second paragraph of the section 257A. Now, in this case interest at the rate of Re. 1-8-0 per cent. per mensem is agreed to be paid on the judgment-debt and it becomes the agreement which provides for the payment of a sum in excess of the sum due under the decree and falls within the purview of section 257, paragraph 2. Cases reported at I. L. R. 9 Bom. 176 and 22 Bom. 693 apply. I therefore hold that the mortgage-bond is void for want of sanction of the Court.

On appeal, the lower Appellate Court reversed this decree and awarded the claim so far as the payment of Rs. 500 was concerned and rejected the claim for interest.

Defendants 2 and 3 appealed to the High Court.

D. W. Pilgaonkar, for the appellants (defendants) :—The bond in question provides for excess over decretal debt and the plaintiff has claimed interest also in his plaint. The words “directly or indirectly,” in section 257A of the Civil Procedure Code (Act XIV of 1882), must be given effect to. *Tukaram v. Anantbhat*⁽¹⁾ is a decision on clause 1 of section 257A. The present suit falls within clause 2 of the section: see *Davlatsing v. Pandu*,⁽²⁾ *Heera Nema v. Pestonji*⁽³⁾ and *Dhanram v. Ganpat*.⁽⁴⁾ The terms of the bond cannot be separated. The whole forms but one agreement and “directly” or “indirectly” it provides for excess over decretal debt. In *Vishnu Vishvanath v. Hur Patel*⁽⁵⁾ such an argument was raised, but the Court held that the consideration for the whole bond was one.

S. R. Bakhale, for the respondent (plaintiff) :—There are two conditions in the bond and they are separate. The condition to pay interest is void. The whole bond is not void. In this case, some portion of the decretal debt is remitted; so the first condition in the bond provides for less than the decretal amount. The cases of *Heera Nema v. Pestonji*⁽³⁾ and *Dhanram v. Ganpat*⁽⁴⁾ do not apply because there was no remission of decretal debt in those cases.

(1) (1900) 25 Bom. 252.

(3) (1898) 22 Bom. 693.

(2) (1884) 9 Bom. 176.

(4) (1902) 27 Bom. 96; (1902) 4 Bom. L. R. 872.

(5) (1888) 12 Bom. 499.

CHANDAVARKAR, J.:—We think that the decree of the Subordinate Judge, with Appellate Powers, in this case is right.

The decree which the respondent (plaintiff) had obtained in 1897 against the appellant (defendant) was for Rs. 529-10-0 and awarded no interest. In full satisfaction of that decree the appellant executed the mortgage-bond in dispute, agreeing to pay Rs. 500 within three months from the date of the bond. So far as this agreement goes it cannot be said to fall within the meaning of paragraph 2 of section 257A of the Code of Civil Procedure, as it was for the payment of a sum *less* than the decretal amount. And it is this agreement which the lower Appellate Court has enforced by passing a decree for Rs. 500 in favour of the respondent.

It is contended, however, for the appellant that it is a term of the mortgage-bond in dispute that if the sum of Rs. 500 were not paid within three months interest at Re. 1-8-0 per cent. per month should run on it until payment. This agreement to pay interest is indeed void under paragraph 2 of section 257A; but, as held by the lower Appellate Court, it is a separate agreement and stands apart from the other, whereby the appellant became liable to pay Rs. 500 within three months. It was open to the respondent to sue on the latter agreement on the expiry of three months, and that right is not affected by the agreement to pay interest in the event of non-payment within that period. It was held in *Davlatsing v. Pandu* ⁽¹⁾ that if there are two agreements in a bond, one of which is void and the other is not, and if one can be separated from the other, the agreement which is not void is not affected by paragraph 2 of section 257A and can be enforced.

We, therefore, confirm the decree with costs.

Decree confirmed.

(1) (1884) 9 Bom. 176.

1903.

BHAGCHAND
v.
RADHAKISAN.

APPELLATE CIVIL.

Before Sir J. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Jacob.

1903.
August 5.

ARAJI SITARAM MODAK AND ANOTHER (ORIGINAL DEFENDANTS),
APPELLANTS, *v.* THE TRIMBAK MUNICIPALITY (ORIGINAL PLAINTIFF),
RESPONDENT.*

*District Municipal Act (Bom. Act II of 1884), sections 27 (2), (17) and 30 (1)
—Contract Act (IX of 1872), sections 2, 23, 25 and 63—Municipality—
Special general meeting—President—Dispensation or remission—Promise
—Contract by Corporation—Executed consideration.*

In order that a meeting of the Special General Committee of a District Municipality should be properly constituted, it must be called by the President under section 27 (2) of the District Municipal Act (Bom. Act II of 1884). If the meeting be not so called, the defect is not cured by section 27 (17).

Under section 63 of the Contract Act (IX of 1872) there can be dispensation or remission only by means of a promise. There must be a proposal of the dispensation or remission which is accepted.

Under section 10 of the Contract Act consideration is not an essential of an agreement. In the Act the word "agreement" refers both to "a promise" and a "set of promises forming the consideration for each other."

* Appeal No. 108 of 1901.

(1) Sections 27 (2), (17) and 30 of the District Municipal Act (Bom. Act II of 1884):
27. The following provisions shall be observed with respect to the proceedings of a Municipality.

* * * * *

(2) The President may, whenever he thinks fit, and shall, upon the written request of not less than one-fourth of the Commissioners, call a Special General Meeting.

* * * * *

(17) No act of a Municipality, or of any Committee, or of any person acting as a Commissioner, or as a President, Vice-President, or Chairman, shall be deemed to be invalid by reason only of some defect in the appointment of such Municipality, Committee, President, Vice-President, Chairman or Commissioner, or on the ground that they, or any of them, were disqualified for the office of Commissioner, or that formal notice of the intention to hold a meeting of a Municipality, or of a Committee, was not duly given, or for any other such mere informality.

30. The President of a Municipality may, on behalf of the Municipality, enter into any contract or agreement in such manner and form as, according to the law for the time being in force, would bind him if such contract or agreement were on his own behalf: provided that the amount or value of such contract or agreement shall not exceed five hundred rupees.

Every other contract or agreement on behalf of a Municipality shall be in writing and shall be signed by the President and by two other Commissioners and shall be sealed with the common seal of the Municipality.

No contract or agreement not executed as in this section provided shall be binding on a Municipality.

Though a contract by a Corporation must ordinarily be made under seal, still, where there is that which is known as an executed consideration, an action will lie though this formality has not been observed.

1903.

ADAJI
SITARAM
v.
TRIMBAK
MUNICI-
PALITY.

APPEAL against the decision of C. D. Kavishvar, First Class Subordinate Judge of Násik, in Original Suit No. 197 of 1899.

Suit to recover a certain amount due on account of the *makta* (farm) of the right of collecting tolls and pilgrim taxes.

The plaintiff, the Trimbak Municipality, on the 12th August, 1896, granted to defendant 1 as principal and defendant 2 as his surety the right of collecting certain tolls and taxes for a period of fourteen months, from the 1st August, 1896, to the 30th September, 1897, from pilgrims visiting the holy place of Trimbak. Defendant 1 had, on account of this grant, agreed to pay Rs. 15,001 to the plaintiff by monthly instalments and had already paid Rs. 1,500 in advance. As many pilgrims did not visit Trimbak on account of the prevalence of famine and plague defendant 1 applied to the plaintiff for remission, stating that he had suffered loss owing to the collection of the revenue being less than was expected. The managing committee of the plaintiff Municipality, thereupon, resolved, on the 31st October, 1896, that the matter as to the remission should be considered at the end of the year or the term of the *makta* (agreement to farm); but subsequently a Special General Committee, assembled on the 17th June, 1897, passed a resolution to the effect that, taking into consideration, the adverse circumstances, such as the prevalence of plague, famine, cholera and other things and the fact that the *maktadár* (farmer) was likely to suffer loss, it was proper to remit Rs. 7,000 and that the sum should be remitted out of the sum agreed to be paid by the *maktadár*. The resolution was passed by the Chairman and five members. Neither the President nor any official member was present at the time. This resolution was subsequently set aside at the meeting of the general body, which, on the 11th January, 1898, held unanimously that the resolution remitting Rs. 7,000 to the *maktadár* was passed without considering the condition and income of the Municipality and that it should be cancelled. This resolution of the general body was approved of by a later Special General Committee assembled on the 25th March, 1898,

1903.

ABAJI
SITARAM
v.
TRIMBAK
MUNICI-
PALITY.

which was presided over by the Collector President and which contained two members more than the previous meetings. This Special General Committee, however, resolved to give remission of Rs. 1,000 *plus* interest Rs. 200, in all Rs. 1,200, provided the defendants paid the balance of the contract money within thirty days of the receipt of the resolution. The defendants having failed to comply with the above resolution, the plaintiff in the year 1899 brought the present suit to recover from the defendants Rs. 9,630 and interest Rs. 2,128-5-6, in all Rs. 10,853-5-6, the balance due under the *makta*, alleging that the resolution to remit Rs. 7,000 was a hasty and illegal resolution passed without sufficient and proper cause and that it was cancelled by the approval of the President.

Defendant 1 contended (*inter alia*) that as the plaintiff had passed a resolution remitting Rs. 7,000 out of the sum due under the *makta*, owing to the prevalence of plague, famine, cholera and distress which occurred during the period of the contract and had communicated that resolution to him, the plaintiff was bound by the resolution and consequently the suit could not be maintained and that there was some misunderstanding as to the levy of the toll-tax.

Defendant 2 answered in addition that as the fulfilment of the contract became impossible by acts of God and Government (who prevented pilgrims from visiting Trimbak), the defendants were in no way liable to the claim and that his liability as surety came to an end under sections 133 and 135 of the Indian Contract Act (IX of 1872) inasmuch as the plaintiff without his consent gave time to defendant 1 for the payment of certain instalments which had already fallen due and further that the plaintiff entered into a compromise with defendant 1 on the 25th March, 1898, without his (defendant 2's) consent and agreed to remit Rs. 1,000.

The Judge found that the plaintiff was not bound to remit Rs. 7,000 on account of the resolution of the 17th June, 1897; that the defendants were not exempted from the fulfilment of the contract on the ground of the occurrence of the plague and famine, and Government officers passing certain rules and orders as to the plague and preventing pilgrims from going to Trimbak;

that defendant 2 was not absolved from liability as a surety; that there was a misunderstanding as to the levy of the toll-tax; that defendants were entitled to have Rs. 2,000 and interest thereon deducted from the amount claimed, and that the plaintiff was not entitled to recover interest. He, therefore, allowed the claim to the extent of Rs. 7,900.

The defendants having preferred an appeal, it came on for hearing before *Jenkins, C. J.*, and *Batty, J.*, on the 16th October, 1902, when the following issues were sent down for findings:—

(1) Had notice been given to the members of the Municipality of the business to be transacted at the meeting of the Special General Committee of 17th June, 1897, and did the proposed remission of Rs. 7,000 form part of such business?

(2) Was the meeting of the Special General Committee of 17th June, 1897, a properly constituted meeting?

(3) Had that meeting authority to pass the resolution for remitting Rs. 7,000?

(4) Was this resolution communicated to defendant 1, and, if it was, when?

The Judge found on issues Nos. 1, 2 and 3 in the affirmative and on issue No. 4 he found that the resolution was communicated to defendant 1 on or about the 24th June, 1897.

Scott (Advocate General, with *D. A. Khare*), for the appellants (defendants).

Raikes (with *Ráo Bahádúr V. J. Kirtikar*), for the respondent (plaintiff).

JENKINS, C. J.:—The plaintiff Municipality has brought this suit to recover a sum of Rs. 10,353-5-6 from the defendants, alleging that this sum is due from defendant 1 as the person to whom the right of levying and collecting certain tolls and taxes had been granted, and that defendant 2 was a surety for defendant 1.

The defence is that the Municipality had by a meeting on the 17th June, 1897 passed a resolution, subsequently communicated to defendant 1, which had the effect of dispensing with, or remitting the performance by him of so much of his obligations as give rise to the present suit, and the surety relies on the

1903.

ABAJI
SITARAM
v.
TRIMBAK
MUNICI-
PALITY.

1903.

ABAJI
SITARAM
v.
TRIMBAK
MUNICI-
PALITY.

provisions of Chapter VIII of the Indian Contract Act as entitling him to a discharge from liability. The case was heard by the First Class Subordinate Judge at Násik with the result that he passed a decree for the plaintiff Municipality for Rs. 7,900. It came on appeal to this Court, and as it was by no means clear that the constitution of the meeting of the 17th of June, 1897, had been properly and thoroughly investigated, the following issues were sent down:—

(1) Had notice been given to the members of Municipality of the business to be transacted at the meeting of the Special General Committee of 17th June, 1897, and did the proposed remission of Rs. 7,000 form part of such business?

(2) Was the meeting of the Special General Committee of 17th June, 1897, a properly constituted meeting?

(3) Had that meeting authority to pass the resolution for remitting Rs. 7,000?

(4) Was this resolution communicated to the defendant 1, and, if it was, when?

The finding on the 1st, 2nd and 3rd issues was in the affirmative; the finding on the 4th was that the resolution was communicated to defendant 1 on or about the 24th June, 1897, *i.e.*, about a week after it was passed.

With those findings the case has now come back to us.

Now from the facts which have been elicited it is clear, and indeed it is conceded on both sides, that the meeting of the 17th of June was an adjourned meeting, and a continuation of that called for the 12th June, so that if the meeting of the 12th June was not properly convened, then that of the 17th is equally defective. The mode of calling meetings is prescribed by Bombay Act II of 1884, which in sub-section (2) of section 27 provides that "the President may, whenever he thinks fit, and shall, upon the written request of not less than one-fourth of the Commissioners, call a Special General Meeting."

The first question, therefore, that we have to ask ourselves is this: Was the meeting called by the President? We are clearly of opinion that it was not; and however anxious we may be to overlook technicalities, it seems to us impossible for us to treat this meeting as one called by the President within the meaning

of that section. But then it is argued by the Advocate General that even if that be so, still the defect is cured by sub-section 17; but we think that is not so; in the circumstances of this case the omission is not one that can be thus got over. But even were this not so, the defence, it is contended, must fail, as there had been no remission or dispensation within the meaning of section 63 of the Contract Act, first because there was no communication of the resolution and, secondly, because the provision of section 30 of Bombay Act II of 1884 has not been observed. In the view that we take of the case, it is unnecessary to consider whether there was a communication of the resolution, and we will at once proceed to the other objection. Now section 30 provides that "the President of a Municipality may, on behalf of the Municipality, enter into any contract or agreement in such manner and form as, according to the law for the time being in force, would bind him, if such contract or agreement were on his own behalf: provided that the amount or value of such contract or agreement shall not exceed five hundred rupees." Then it goes on to provide (and it is with this part of the section that we are concerned, and with this part alone) that "every other contract or agreement on behalf of a Municipality shall be in writing, and shall be signed by the President and by two other Commissioners and shall be sealed with the common seal of the Municipality." Therefore we have to ask ourselves whether a dispensation or remission under section 63 is a contract or agreement.

Now we must first turn to section 2 of the Contract Act, which provides how certain terms are to be interpreted. We are told in clause (a) what amounts to a "proposal" and a "promise." According to clause (b), "when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise." Then in clause (f) it is provided that "promises which form the consideration or part of the consideration for each other are called reciprocal promises."

Clause (e) says that "every promise and every set of promises, forming the consideration for each, is an agreement." It is only by means of a promise that there can be a dispensation or remission within the meaning of section 63; there must be a proposal

1903.

ABAJI
SITARAM
v.
TRIMBAK
MUNICI-
PALITY.

1903.

ABAJI
SITARAM
v.
TRIMBAK
MUNICIPALITY.

of the dispensation or remission, which is accepted. But a promise as we read clause (e) is an agreement; for the words "forming consideration for each other" in clause (e) cannot qualify the words "every promise"; they relate to the words "every set of promises." Moreover, we think, it involves no straining of language to speak of a promise as an agreement; for an agreement does not necessarily (as was argued) imply consideration.

In support of the contention that consideration is an essential element of an agreement, we were referred to section 10 of the Contract Act; but the section does not (in our opinion) suggest that inference, for it is there provided that "all agreements are contracts if" (among other things) "they are for a lawful consideration." But when we turn to section 25 of the Act, it is made clear beyond doubt that consideration is not an essential part of an agreement, because we have a provision that "an agreement made without consideration is void" *except* in the cases there indicated. We think that the word "agreement" was selected in the interpretation clause as a compendious mode of referring both to "a promise" and "a set of promises forming the consideration for each other," in the Act. Therefore we hold that assuming there was a legal resolution, and that it was communicated as alleged, still inasmuch as a dispensation or remission under section 63 requires an agreement or contract, the resolution was of no legal effect since the provisions of section 30 of Bombay Act II of 1884 have not been observed.

This discussion leads us to consider a point, which was raised before us for the first time, and then only as a result of investigations made in the course of the hearing before us. It appears that the contract under which defendant 1 became entitled to levy and collect the tolls was not under seal, and so failed to comply with section 30 to which I have already alluded. The Advocate General, relying for this purpose on section 23 of the Indian Contract Act, has asked us to hold that there was no contract at all under which the plaintiff Municipality can claim. Apart from the fact that this is travelling outside the pleadings of the parties, we think, there is another reason why we cannot give effect to the contention. It is well recognised law in

1903

ABAJI
SITARAM
v.
TRIMBAK
MUNICI-
PALITY.

England that though a contract by a corporation must ordinarily be under seal, still where there is that which is known as an executed consideration, an action will lie though this formality has not been observed. Notwithstanding section 23 of the Indian Contract Act, we see no reason for not adopting the same view of the law here. For we think when regard is had to the principle on which the English Courts have proceeded, it is clear we do not run contrary to any provision of section 23 of the Contract Act in holding that in this country too, as in England, where there is an executed consideration, a suit will lie even in the absence of a sealed contract. And on the facts of this case we hold that there has been an executed consideration. It is, however, at the same time manifest that the doctrine we have here applied would on the facts in no way assist the defendant's contention that the performance of his promise has been legally dispensed with or remitted.

It now only remains for us to consider the position of the defendant 2, who pleads that he, as a surety, is discharged from liability on the ground that either there has been a variation of the contract within the meaning of section 133 of the Indian Contract Act or there has been a contract between the creditor and the principal debtor within the meaning of section 135. But the answer appears to us to be a very short one. There has been no variation and no contract. A variation, in the circumstances with which we have to deal, implies a contract: and there has been no contract binding on the Municipality for the reason that provisions of section 30 of the Bombay District Municipal Act II of 1884 have not been observed, nor to this phase of the case has the doctrine of executed consideration any application.

For these reasons we think the decree of the lower Court must be confirmed with costs.

Decree confirmed.

APPELLATE CIVIL.

Before Mr. Justice Chundavarkar and Mr. Justice Jacob.

1903.

August 5.

LAKSHMAN NARAYAN BHAGVAT (ORIGINAL PLAINTIFF), APPELLANT,
v. GOVIND MAHADEV GHATE (ORIGINAL DEFENDANT), RESPONDENT.*

GOVIND MAHADEV GHATE (ORIGINAL DEFENDANT), APPELLANT, v. LAK-
SHMAN NARAYAN BHAGVAT (ORIGINAL PLAINTIFF), RESPONDENT.*

Bombay Revenue Jurisdiction Act (X of 1876), section 4 (b) (1)—Inamdar—Occupancy tenant—Claim by the inamdar to recover assessment according to the survey rates—Tenant setting up fixed assessment—Objections under section 4 (b)—Civil Court—Jurisdiction.

The plaintiff, an Inamdar, sued to recover from the defendant, an occupant, the assessment of the lands held by him in accordance with the survey rates. The defendant contended, among other things, that under certain *Maphi Istawa Kowls* held by him, he had acquired the right to hold the lands permanently on payment of a fixed sum as rent. Plaintiff contended that by virtue of section 4, clause (b), of the Bombay Revenue Jurisdiction Act (X of 1876), the Civil Court was precluded from entertaining the defendant's contention.

Held, that clause (b) of section 4 of the Bombay Revenue Jurisdiction Act (X of 1876) presented no bar to the hearing by the Civil Court of the contention set up by the defendant.

An objection to come within 1st head of section 4, clause (b), of the Bombay Revenue Jurisdiction Act (X of 1876) must be "to the amount or incidence of any assessment of land revenue" itself and as such, in other words, apart from the question of any other and independent right, if an occupancy tenant complains that though he is bound to pay the assessment of land revenue, the amount or incidence of it as authorized by Government is too high, having regard to the nature of the soil and quality of his land and other like considerations, the

* Cross-appeals Nos. 80 and 90 of 1902.

(1) Section 4, clause (b), of the Bombay Revenue Jurisdiction Act (X of 1876), runs as follows:—

4. Subject to the exceptions hereinafter appearing, no Civil Court shall exercise jurisdiction as to any of the following matters:—

* * * * *

(b) Objections—

to the amount or incidence of any assessment of land revenue authorized by Government, or

to the mode of assessment, or to the principle on which such assessment is fixed, or

to the validity or effect of the notification of survey or settlement, or of any notification determining the period of settlement.

1903.

LAKSHMAN
v.
GOVIND.

objection is one purely and simply to such amount or incidence. But if without questioning the legality or propriety of the amount or incidence *per se*, he asserts a right independent of and having no relation to it, such as a right to pay a certain fixed amount annually under a contract between him and the Inamdar he cannot be said to object to the amount or incidence of the assessment. Nor can such a tenant be said by his objection to object to the validity or effect of the notification of survey or settlement under the 3rd head of clause (b) of section 4 of the Bombay Revenue Jurisdiction Act (X of 1876).

"Objections" in section 4, clause (b) of the Act, can be raised by a suit or in defence to a suit.

CROSS-APPEALS from the decision of V. V. Phadke, First Class Subordinate Judge, A. P., at Thána, varying the decree passed by R. B. Chitale, Subordinate Judge of Pen.

The plaintiff, an Inamdar, sued to recover Rs. 133-6-2 from the defendant, an occupant, on account of assessment of the lands held by the latter in accordance with the survey rates.

The defendant contended (*inter alia*) that he was not liable to pay the increased assessment since he occupied his holding at fixed permanent assessments.

It was urged on behalf of the plaintiff that the contention raised by the defendant was in the nature of an objection to the "amount or incidence of any assessment of land revenue authorized by Government" within the meaning of clause (b) of section 4 of the Revenue Jurisdiction Act (X of 1876) and that the Civil Courts were precluded from exercising jurisdiction in the matter.

The Court of first instance was of opinion that under section 4, clause (b), of the Revenue Jurisdiction Act (X of 1876), the Civil Court could not inquire into the question whether the defendant was entitled to claim partial exemption as, in its opinion, it involved an objection "to the amount or incidence of an assessment of land revenue authorized by Government."

The lower Appellate Court, on appeal, held that the Civil Court has jurisdiction to entertain suits or defences based on claims for exemption after a survey settlement has been introduced in respect of the assessment on lands covered by such survey. The following were the reasons:—

"It has been urged by the defendant that the term 'land revenue' means only revenue claimable by or on behalf of Government, and that the revenue claimed by an Inamdar is therefore not land revenue within the meaning of the

1903.

LAKSHMAN
v.
GOVIND.

term; and hence the Act is not applicable to cases wherein such revenue is in question. If that were so, the provisions of the Act would not be applicable to disputes between superior and inferior holders, consequently section 4 would not bar jurisdiction in such questions, and the provision in section 5, clause c, for exempting such suits from the operation of section 4 would be meaningless. The lower Court has given an extensive account of the change that has taken place in the law on the subject of the jurisdiction of Civil Courts in matters of land revenue. The conclusion arrived at by that Court, that the jurisdiction of Civil Courts has been much curtailed by the Revenue Jurisdiction Act, is true. The question is whether the Court is debarred from entertaining questions like the one involved in this suit, i.e., a claim to partial exemption from land revenue. It is said that such claims are objections to the amount or incidence of an assessment authorized by Government. Now I would interpret the phrase 'objection to the amount or incidence of any assessment' as meaning objection to the measurement or classification of land. I shall give an illustration. A particular occupant thinks that the survey authorities have committed an error in classifying his land, and that the land which has been assessed at annas 8 per acre has been assessed at Re. 1. If he raises an objection like this, it will be an objection to the incidence of the assessment, and no Court would be authorized to entertain it again, the occupant may say that the classification is fair, but that a mistake has been committed in the measurement, and consequently the amount fixed is excessive. That would be an objection to the amount and would be equally barred. This view is, I think, supported by the decision of the High Court in *Gangadhar v. Morbhat* (I. L. R. 18 Bom. 525). Let us consider the point more minutely. If claims for partial exemption come under clause (b) of section 4, then that clause would have operated to bar such claims, and there would have been no necessity for providing in clause (f) that Civil Courts should not take cognizance of claims against Government to hold land wholly or partially free from payment of land revenue. Such an express provision, therefore, shows that such claims are not covered by clause (b). Moreover, by Act XVI of 1877, section 5 was amended by the addition of a proviso that in certain specified districts, Courts shall not be prevented by anything contained in section 4, from entertaining such suits against Government for claims to hold land wholly or partially exempt. If, therefore, the interpretation which Mr. Chaubal puts on section 4 be true, the result would be that, in the said scheduled districts, occupants of land would be at liberty to put forth *against Government* claims for total or partial exemption from payment of land revenue, but they would be debarred from putting forth the same claims *against private persons*. That would be a very unreasonable state of things; and hence the contention cannot be allowed. I therefore hold that the Court is not precluded from entertaining the claim urged by defendant for partial exemption."

Against this decision the parties preferred cross-appeals to the High Court.

APPEAL No. 80 OF 1902.

M. B. Chaubal, for the appellant.

V. N. Manohar, for the respondent.

APPEAL No. 90 of 1902.

G. S. Rao, for the appellant.

M. B. Chaubal, for the respondent.

APPEAL No. 80 of 1902.

CHANDAVARKAR, J.:—These second appeals have been heard together and the point which is common to all has been argued in Second Appeal No. 80. That point arises in this way. The suits have been brought by the plaintiff to recover from the defendant the assessment of the lands held by him, in accordance with the survey rates. The defendant resists the claim on several grounds, one of which is that under certain *Maphi Istava Kowls* held by him, he has acquired the right to hold the lands permanently on payment of a fixed sum as rent and that therefore, as he is not liable to pay more than that sum, this claim to recover the assessment according to survey rates cannot lie. For the plaintiff it is contended that Civil Courts have no jurisdiction to hear this objection and section 4, clause (b), of Act X of 1876 (The Bombay Revenue Jurisdiction Act) is relied upon. Clause (b) of section 4 provides that no Civil Court shall exercise jurisdiction as to any objections (1) to the amount or incidence of any assessment of land revenue authorized by Government; (2) to the mode of assessment, or to the principle on which such assessment is fixed; and (3) to the validity or effect of the notification of survey or settlement, or of any notification determining the period of settlement. It is an admitted fact that the assessment of land revenue on which the plaintiff has based his claim has been authorized by Government in respect of the lands in dispute which lie in the plaintiff's inam villages and that that assessment is in accordance with the notification of a survey settlement duly made under the Land Revenue Code. The question was raised for the defendant whether what the plaintiff claimed could fall within the definition of "land revenue" in the Bombay Revenue Jurisdiction Act. We do not think that it is necessary

1903.

LAKSHMAN
v.
GOTIND.

1903.

LAKSHMAN

v.
GOVIND.

for the purposes of these appeals to decide that question, because, assuming that the plaintiff's right as assignee of the Government who can recover land revenue, is substantially that of one claiming such revenue on behalf of Government, the question still remains whether the objections of the defendant based on his *kowls* are objections which fall under any of the three heads of clause (b) of section 4 of the Bombay Revenue Jurisdiction Act. It is conceded for the plaintiff that the objections in question do not come under the second head of clause (b), so that we have to see whether they fall under either of the other two heads. To fall under the first the objection must be "to the amount or incidence of any assessment of land revenue." In one sense no doubt whenever an Inamdar sues an occupancy tenant to recover land revenue according to the survey rates and the tenant resists the claim on the ground that he has acquired a right as against the Inamdar to pay rent or revenue at a permanently fixed rate, he may be said to object to the amount or incidence of land revenue authorized by Government. But it is an objection which does not hit the amount or incidence directly; that is its indirect effect, which is not what the first head of clause (b), having regard to its language, was intended to strike at. The objection must be "to the amount or incidence of any assessment of land revenue" itself and as such. In other words, apart from the question of any other and independent right, if an occupancy tenant complains that though he is bound to pay the assessment of land revenue, the amount or incidence of it as authorized by Government is too high, having regard to the nature of the soil and quality of his land or other like considerations, the objection is one purely and simply to such amount or incidence. But if, without questioning the legality or propriety of the amount or incidence *per se*, he asserts a right independent of and having no relation to it, such as a right to pay a certain fixed amount annually under a contract between him and the Inamdar, he cannot be said to object to the amount or incidence of the assessment. In such a case what in effect he says is: "The amount or incidence of the assessment is all right. I have nothing to say to that; but you, the Inamdar, have entered into a contract with me and all I claim is that you are bound by it." Nor can

such a tenant be said by his objection to object to the validity or effect of the notification of survey or settlement under the 3rd head of clause (b). So far as the notification goes by itself, he does not question either its validity or effect. What in effect he says is: "I am not concerned with either of them. I set up an independent right which has no connection with the question of the validity or effect of the notification of survey settlement." We are of opinion, then, that an objection to come within either of the two heads of clause (b) of section 4 must be an objection which reaches them directly, *i.e.*, an objection to them *per se* which admits the liability to pay land revenue on the part of the objector but quarrels with its amount or incidence or the validity and effect of the notification of survey settlement as *by themselves* objectionable, not because some other right affects them or makes them inapplicable to his particular case. That this is the plain meaning of the Legislature appears clearly from a consideration of the proviso to section 4 and from section 5 of the Act. According to the proviso to section 4, a Civil Court has jurisdiction to entertain any suit where any person claims to hold land, wholly or partially exempt from payment of land revenue under any enactment, or under a sanad or instrument granted by or by order of the Governor in Council under Bombay Act No. 2 of 1863, etc., or any other written grant by the British Government expressly creating or confirming such exemption or a judgment by a Court of law, etc. The effect of this proviso is that where an occupancy tenant holding under Government is called upon to pay land revenue according to the survey rates, it is open to him to resist the claim of Government in a Civil Court on the ground that he holds under a written grant or an enactment, etc., which prevents Government from claiming more than can be recovered under the grant or enactment, etc. And as to Inamdars and occupancy tenants holding under them, section 5 provides that "nothing in section 4 shall be held to prevent the Civil Courts from entertaining" suits between private parties for the purpose of establishing any private right, although it may be affected by any entry in any record of a revenue survey or settlement, or in any village papers. In the present case the defendant virtually sets up his private rights as against

1903.

LAKSHMAN

"GOVIND.

1903.

LAKSHMAN
vs
GOVIND.

the Inamdars and the suits are between private parties. Moreover, section 5, clause (c), provides that nothing in section 4 shall be held to prevent Civil Courts from entertaining suits "between superior holders or occupants and inferior holders or tenants regarding the dues claimed or recovered from the latter." It was held by this Court in *The Secretary of State for India v. Balvant Ramchandra Natu* ⁽¹⁾ that an *Inamdar* is "a superior holder" within the definitions of Regulations XVII of 1827 and Bombay Acts I of 1865 and V of 1879. But it was said that, even assuming clauses (b) and (c) of section 5 applied to the objections of the defendant, all that that section allowed was a suit; here the defendant was not suing but was resisting suits brought against him by the Inamdar. We do not think that the Legislature intended to allow such objections as the defendant has raised only where they were raised by a suit and not in defence. "Objections" in section 4, clause (b), may be raised by a suit or in defence to a suit, but in whichever way they are raised they must be of the particular nature described in clause (b). Where they fall outside that class, they can be raised in defence to as well as by a suit.

It was, however, urged before us that sections 52 and 217 of the Bombay Land Revenue Code debarred the defendant from raising the objections in question, founded on the *Maphi Istava Kowls* on which they rely. But section 52 does not affect the right of a party who holds lands under Government or an Inamdar by virtue of a special grant; nor does section 217. The effect of the first is to give the Collector the discretion to fix the assessment; the effect of the second is to render the occupants in alienated villages subject to a settlement like the occupants in unalienated villages. But neither section takes away any legal right which an occupancy tenant may have acquired independently of his bare status as an occupancy tenant liable to pay the land revenue according to survey rates. We, therefore, dismiss the appeal without costs.

APPEAL No. 90 of 1902.

We have already intimated in the course of argument that we must accept the finding of fact by the lower Appellate Court

(1) (1892) 17 Bom. 422.

that the grant under Exhibit 17 was unauthorized and not binding on the present plaintiff.

The Subordinate Judge, A. P., has decided in favour of the plaintiff the question of limitation raised in this case on the ground that there has been for twelve years before suit no demand on the part of the Inamdar and no refusal on the part of the tenants in respect of rents at a higher rate than that fixed in the *kowl*, Exhibit 17. But the question does not depend on mere demand and refusal. If it appears on the evidence that the tenants disputed in 1879 the Inamdar's right to recover otherwise than under Exhibit 17 and that, thereafter, for twelve years they went on paying the reduced assessment under that document, the Inamdar's right must be held to be barred. Now, the case of the tenants is that in 1879 when the Inamdar debited them in the receipt books with sums over and above those they had paid in accordance with Exhibit 17, they gave him a notice (Exhibit 13) protesting against the debit entries. But the lower Appellate Court has held that Exhibit 13 is not proved to have been served on the Inamdar. On this finding Mr. Chaubal has invited us to hold that there was no claim based on Exhibit 17, set up by the tenants in 1879, to the knowledge of the Inamdar, and indeed we must come to that conclusion having regard to the facts found by the lower Court. The receipt books for 1879 on which the tenants rely have reference to payments for several years, one of which is the year previous to that of the *kowl*, Exhibit 17. It is found that when the Inamdar called upon some of the tenants to produce their *kowls*, this *kowl*, Exhibit 17, was not produced or brought to his knowledge; it is not shown as to other tenants that they produced their *kowls* and the notice, Exhibit 13, is held not to have been served on him. These facts found by the lower Court show that the tenants did not set up their right based on Exhibit 17 to the Inamdar's knowledge in 1879. Then there remains the fact, also found by the lower Court, that the tenants paid for fifteen years after 1879 the reduced assessment according to Exhibit 17. But we cannot presume adverse possession in favour of the tenants from that single circumstance when the Court of facts has declined to do that, especially because these payments may in the absence of special circumstances be referred to the lawful title of the Inamdar to recover from

1903.

LAKSHMAN
v.
GOVIND.

1903.

LAKSHMAN

v.

GOVIND.

the tenants assessment to the extent allowed as reasonable by the custom of the village. The special circumstances alleged in the present case have been urged by Mr. Rao as justifying the inference of an adverse right in favour of his clients, but the inference is an inference of fact which the lower Appellate Court has declined to draw, and we see no error of law in that Court's conclusion. As to the *savaisut* which is not allowed by that Court, it is clear that the contract as to it was conditional upon the continued existence of the measurements accepted by the parties at the time of the *kowls* as the basis of their mutual claims for the future. These measurements ceasing to exist, the basis on which the right to *savaisut* rested fails. There is no error in the award of interest. We must, for these reasons, dismiss the appeal without costs.

JACOB, J.:—I entirely concur.

I would merely add to the judgment in Second Appeal No. 80 of 1902 that the introduction of the first branch of clause (f) of section 4 of Act X of 1876 affords another almost conclusive argument against the plaintiff's contention, since if that contention were sound the object expressly aimed at by the first branch of clause (f) is already fully covered by the provisions of clause (b).

Appeals dismissed.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Jacob.

1903.

August 6.

RUDRAPA AND ANOTHER, SONS AND HEIRS OF VIRBHADRAPPA BIN IRAPPA (ORIGINAL DEFENDANT 2), APPELLANT, v. IRAVA AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Hindu Law—Dhárwār district—Succession—Sister—Brother's widow.

In the district of Dhárwār a sister is preferred as an heir to a brother's widow.

SECOND appeal from the decision of R. Knight, District Judge of Dhárwār, confirming the decree of R. Reuben, Subordinate Judge of Háveri.

* Second Appeal No. 4 of 1903.

Suit by a sister to recover possession of the property of her deceased brother as his heir.

The property in suit belonged to one Malkapa bin Chenbasapa who died about the year 1880-81, leaving him surviving a widow Adveka and a sister Gangava. Adveka managed the property till the 8th April, 1887, when she died. Malkapa had a divided brother Nagapa, who died before Malkapa, leaving a widow San-Irava. On the 5th July, 1899, Gangava as the heir of her brother Malkapa brought the present suit to recover possession of Malkapa's property. After the suit was filed Gangava died and her daughters Irava and Puttava were joined as her legal representatives.

Defendant 1 was absent.

Defendant 2 contended that the deceased Gangava was not Malkapa's sister; that Malkapa's widow Adveka, for a legal necessity, sold the property in dispute to defendant 1 in 1883, and that defendant 1 sold it to him (defendant 2) on the 23rd November, 1892.

The Subordinate Judge found that Gangava was Malkapa's sister; that Adveka was not competent to sell the property to defendant 1 as there was no legal necessity for her to do so, and that though the sale-deed set up by defendant 2 was proved, that circumstance did not help him. He, therefore, allowed the claim.

On appeal by defendant 2 the Judge confirmed the decree.

Defendant 2 preferred a second appeal.

S. V. Bhandarkar (with *N. V. Gokhale*), for the appellant (defendant 2):—The first Court was wrong in stating that Nagapa's widow San-Irava was dead. She is alive. Malkapa and Nagapa were divided in interest. Therefore the question to be considered is whether Gangava, the sister of Malkapa, or San-Irava, the widow of Nagapa, are his heirs and who, out of the two, has the right to sue. The Mitakshara does not mention a sister as heir. She is treated as a *bandhu* and therefore cannot succeed in preference to the brother's widow who is a *sagotra sapinda*. The case has come from Dhárwar where the Mitakshara prevails and not the Mayukha. A female passes by her marriage into the *gotra* of her husband. According to the Mitakshara the

1903.

RUDRAPA

v.
IRAVA.

1903.

RUDRAPA

v.
IRAVA.

test is that a female, in order that she may come in as heir, must belong to the family of the propositus. A sister owing to her marriage ceases to belong to the family of her brother. The Madras High Court in *Kutti Ammal v. Radakristna Aiyar* ⁽¹⁾ treats a sister as heir to her brother. But that decision has been commented upon: see Mayne's Hindu Law, Sixth Edition, section 537, page 705. Refers to *Lallubhai Bapubhai v. Mankuvarbai* ⁽²⁾, *Mulji v. Cursandas* ⁽³⁾, *Thakoorain Sahiba v. Mohun Lall* ⁽⁴⁾, *Rachava v. Kalingapa* ⁽⁵⁾, *Jullessur Kooer v. Uggur Roy* ⁽⁶⁾, West and Buhler, Third Edition, pages 114, 131. The Mayukha treats a sister merely as a *gotraja* and assigns her a place between grandmother and grandfather.

We submit that the Mitakshara ought to govern the present case and according to that school a sister is not entitled to succeed to her deceased brother, she being not a *sagotra sapinda* of the propositus. She has no place in the line of heirs mentioned therein. Therefore Gangava had no right to institute the suit and her two daughters had no right to continue it.

Settur, with *B. N. Inamdar*, for the respondents (plaintiffs):—The term *gotraja* has two significations with respect to a sister. The term means 'born in the family.' The Mayukha accepts this interpretation, while the Mitakshara considers the term metaphorically and interprets it as *Samāngotra* (i.e., of the same *gotra*). We do not contend that under the Mitakshara a sister is a *gotraja*, but we submit that in this Presidency the interpretation of the Mitakshara by Balambhatt and Nand Pandit is recognized as correct and according to that interpretation a sister is included in the term *bhrātara* (brothers). The interpretation of Balambhatt is considered by usage to be the law in this Presidency: *Vinayak Anandray v. Lakshmi Bai* ⁽⁷⁾, *Lakshmi v. Dada Nanaji* ⁽⁸⁾, *Ganesh Vaman v. Vaghu*. ⁽⁹⁾ These rulings support our contention. Balambhatt includes a sister in the term brother just as mother is included in the term father. The usage in this

(1) (1875) 8 Mad. H. C. R. 88.

(2) (1876) 2 Bom. 388.

(3) (1900) 24 Bom. 563.

(4) (1867) 7 W. R., P. C. 25.

(5) (1892) 16 Bom. 716.

(6) (1882) 9 Cal. 725.

(7) (1864) 1 Bom. H. C. R. 117, 128.

(8) (1879) 4 Bom. 210.

(9) (1903) 27 Bom. 610; (1903) 5 Bom. L. R. 581.

1903.

 RUDRAPA
 v.
 TRAVA.

Presidency is that according to judicial tradition a sister is to be preferred according to Balambhatt. The ruling in *Bhagirthibai v. Kahnajirav* ⁽¹⁾ sets out the meaning of the term usage and according to that usage the place of the sister in the line of inheritance is also fixed. She comes after brother. Even if our contention be not upheld, still according to the Mayukha the sister would come in after the grandmother. The Mayukha is strictly applicable to the Maratha country which does not include Dhárwár which forms part of Kánara. The Mayukha was compiled by a Poona Shastri, and when the Peshwas conquered Gujarát, they made it applicable to that part of the country.

The observations in Mayne's Hindu Law, section 537, page 705, were relied on. According to those observations a sister will never be the heir. Further those observations were directed to the ruling in *Kutti Ammal v. Radakristna Aiyan* ⁽²⁾, therefore they cannot be relied on by way of argument. Under the authority of *Rachava v. Kalingapa* ⁽³⁾ a brother's widow would be postponed to a sister. She would be postponed also on the ground that she is not mentioned in the compact series: *Jullessur Koor v. Uggur Roy* ⁽⁴⁾ which was relied on accepts the interpretation of Balambhatt. *Kutti Ammal v. Radakristna Aiyan* ⁽²⁾ correctly interprets the Mitakshara.

Bhandarkar, in reply :—Great reliance was placed on usage, but it is difficult to understand where it came from. Sir Michael Westropp, C. J., has expressly relied on the texts of Balambhatt and Nand Pandit in *Lallubhai Bapubhai v. Mankuvarbai* ⁽⁵⁾ for the exposition of the Mitakshara. With great respect we submit that Sir Michael Westropp, C. J., came to a wrong conclusion by accepting the interpretation of those two commentators. The question may be argued again.

JENKINS, C. J. :—The only legitimate subject for discussion in this second appeal is the bare point of law whether in the district of Dhárwár a sister or a brother's widow is to be preferred as an heir. These questions, in which the right of

(1) (1886) 11 Bom. 285.

(3) (1892) 16 Bom. 716.

(2) (1875) 8 Mad. H. C. R. 88.

(4) (1882) 9 Cal. 725.

(5) (1876) 2 Bom. 338.

1903.

RUDRAPA
v.
IRAYA.

female heirs comes under debate, turn in Bombay, on considerations peculiar to this Presidency, and it is therefore useless to seek guidance in the decisions of the other High Courts. In Gujarát and the Island of Bombay the right of a sister to a high place in the order of succession has long been determined, and has the sanction of the Mayukha, whose author is said to have flourished about 250 years ago.

It has been urged before us that in the other districts of the Presidency the sister's succession is governed by the Mitakshara, which does not name the sister. As against this, reliance has been placed on the interpretation of the Mitakshara by Balam-bhatta and Nanda Pandita, who maintain that sisters are included in "brethern" according to the true rules of Sanskrit exegesis: and in support of its applicability in the Bombay Presidency reference has been made to the opinion of Sir Michael Westropp. It is further contended that for the purpose of a sister's succession the rule of the Mayukha is not limited to Gujarát and the Island of Bombay, but is also of authority in the other districts of the Presidency. That there is a usage, under which the sister succeeds as an heir when outside Gujarát and the Island of Bombay, is, we think, beyond doubt; the struggle has been to reconcile that usage with the Sanskrit commentaries, but in view of the decided cases it appears to us immaterial whether we invoke in support of it the rule of Nilkanth or the interpretation of Balam-bhatta or Nanda Pandita.

It has been decided by Sir Michael Westropp and Mr. Justice Kimball in *Lakshmi v. Dada Nanaji* ⁽¹⁾ and *Biru v. Khandu* ⁽²⁾ that the sister, in the Sholapur district is not only an heir, but is entitled to preference even over some who are *gotraja sapindas*. It is therefore clear that even outside Gujarát and the Island of Bombay the sister must be conceded a position not lower than that given her by Nilkanth, so that she is entitled to preference over the brother's widow, who in this Presidency comes in as the wife of a *gotraja sapinda* after the sister.

It has been strenuously argued before us that Sir Michael Westropp's decision was erroneous and that we are not bound by it, or that we at any rate should refer the question to a Full

(1) (1879) 4 Bom. 210.

(2) (1879) 4 Bom. 214.

Bench. But we think it would be absolutely wrong for us to do anything to disturb a rule of inheritance established so far back as 1879.

In our opinion, therefore, on the strength of the authorities in *Lakshmi v. Dada Nanaji*⁽¹⁾ and *Biru v. Khandu*,⁽²⁾ we must award preference to the sister and on that ground confirm the decree of the lower Appellate Court with costs.

Decree confirmed.

(1) (1879) 4 Bom. 210.

(2) (1879) 4 Bom. 214.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Jacob.

PURSHOTTAM KRISHNAJI (ORIGINAL DEFENDANT 2), APPELLANT, v. SAGAJI VALAD MALJI AND OTHERS (ORIGINAL PLAINTIFFS AND DEFENDANT 1), RESPONDENTS.*

1903.

August 11.

Redemption suit—Mortgage by persons other than the real owner—Acquiescence of the real owner—Mortgagee's possession adverse to the real owner.

On the 24th October, 1873, one Durgan, widow of Govindji, mortgaged with possession certain land to Godaji, the husband of her daughter Rau. After Durgan's death in 1882, the plaintiffs, under a belief then prevalent, claimed as the nearest *Waras Bhaubands* of Govindji to have succeeded to the mortgaged property, to the exclusion of Govindji's daughter Rau, and disputed the validity of Durgan's mortgage. Godaji, thereupon, on the 22nd June, 1882, accepted a mortgage from the plaintiffs. Rau was aware of this transaction and acquiesced in it. In July, 1889, Rau sold her equity of redemption to one Savliaram who paid off Godaji's mortgage and recovered possession of the mortgaged property. The plaintiffs, in September, 1899, brought a suit against Godaji and Savliaram, defendants 1 and 2, to redeem the mortgage of the 22nd June, 1882.

Held, that the plaintiffs were entitled to redeem, Rau's claim to the equity of redemption having become time-barred. After the mortgage in suit Godaji held the property as plaintiffs' mortgagee and his possession must be attributed to a right derived from them, Rau being aware of what was being done and having acquiesced in it. Though Godaji's possession in its inception was not by virtue of a right derived from the plaintiffs, still his possession was from the 22nd June, 1882, under colour of a right derived from them and so adverse to

* Second Appeal No. 122 of 1903.

1903.
 FURNISHO TAM
 v.
 SAGAIL.

Rau and that to her knowledge although Godaji took possession under a mistake common to all as to Rau's rights, still that circumstance did not make his possession any the less adverse.

SECOND appeal from the decision of F. C. O. Beaman, District Judge of Poona, confirming the decree of Ruttonji Mancherji, Subordinate Judge of Junnar.

Redemption Suit.

The land in suit belonged to one Govindji Harji, whose widow, Durgan, mortgaged it with possession to defendant 1, Godaji valad Sambaji, for Rs. 900 on the 24th October, 1873. Durgan died in the year 1882, leaving a daughter Rau, the wife of defendant 1. Some time after Durgan's death, the plaintiffs claiming to be the nearest *Varas Bhaubands* (heirs and relatives) of the deceased Govindji Harji to the exclusion of his daughter Rau, disputed the validity of the mortgage by Durgan to defendant 1 and caused obstruction to his possession. Defendant 1, thereupon, accepted a mortgage from the plaintiffs for Rs. 800 on the 22nd June, 1882. On the 29th July, 1899, Rau sold the equity of redemption to defendant 2, Savliaram valad Ganuji, who paid off the mortgage of defendant 1 and recovered possession of the property. On the 4th September, 1899, the plaintiffs brought the present redemption suit against defendants 1 and 2 on the mortgage of the 22nd June, 1882, alleging that they had on the 11th May, 1889, called upon defendant 1 to render an account and to allow redemption, but he failed to do so, and praying that if any balance of debt be found to be due by them, it should be made payable by annual instalments of rupees twenty-five each.

Defendant 1 contended, *inter alia*, that the plaintiffs were not the nearest heirs of Govindji Harji; that his nearest heir was his daughter Rau, the wife of the defendant, and that he was compelled to accept the mortgage in suit by fraud and coercion exercised in that behalf by the plaintiffs.

Defendant 2 relied on his purchase from Rau and the subsequent redemption and recovery of possession from defendant 1. He further contended that the mortgage in suit was fraudulent and, therefore, not binding on Rau and that as against him the plaintiffs were not entitled to redeem.

The Subordinate Judge found that defendant 1 was estopped from questioning the plaintiffs' title to redeem the land; that defendant 1 was not obliged to accept the plaintiffs' mortgage by fraud and force or coercion; that he was not justified in allowing redemption by defendant 2; that defendant 2 had no title to redeem and that as defendant 1 admitted having received the mortgage-money from defendant 2, the plaintiffs were entitled to redeem the land on payment of Rs. 800 to defendant 2 by three equal yearly instalments. With respect to the mortgage by the plaintiffs to defendant 1, the Subordinate Judge made the following observations:—

In the (mortgage) deed accepted by defendant 1, he has himself acknowledged that Durgan died leaving no male issue or other nearer heir, and that the plaintiffs were therefore her nearest *Varas Bhaubands* (blood relations) and were then in possession of Govindji's estate, except the land in suit, which was reserved and given by the plaintiffs to Durgan for her maintenance for life. Plaintiffs put in certain documents with their *darkhast* (Exhibit 19) to show that Durgan herself, while she was alive, acknowledged them as her nearest heirs, but in the absence of sufficient evidence in proof of them, I did not see any way to admit them upon the record. However, the cross-examination of defendants' own witnesses shows that Govindji had 30 or 35 bighas of land in addition to the land covered by the mortgage, and the whole of that land passed into plaintiffs' possession after Govindji's death and during Durgan's life-time. And this would not have happened if Durgan had not recognized the plaintiffs as the nearest heirs of her deceased husband. If Govindji left a daughter as alleged by defendant 1, her right to succeed to her father's estate after the death of her mother, appears to have been completely ignored, and several cases have come to my knowledge since I have been in charge of this Court, which showed that the general belief of an ordinary Hindu is that a daughter has no place in the order of inheritance or succession, and that when a man dies leaving a daughter and paternal relations, however, distant inheritance should go to the latter in preference to the former. The parties appear to have acted according to this general belief when the plaintiffs passed and defendant 1 accepted the mortgage now sought to be redeemed. Whether the said belief was well founded or otherwise I have nothing to do, but there can be no doubt that both the parties entertained the said belief honestly and sincerely. Defendant 1 now finds out that he was wrong in entertaining the said belief and tries to back out of the second mortgage transaction. But this he has apparently no right to do. He accepted the mortgage in the honest and *bona fide* belief that the plaintiffs were the nearest heirs of Govindji, and consented of his own accord to hold the land on their behalf, and he is therefore bound to allow redemption to them. If he thought his own wife had a preferential right to the property, and he committed

1903.

PURNAGRAM

SAGAJI.

1903.

PURSHOTAM
v.
SAGAIL.

a mistake in accepting a mortgage from the plaintiffs, he ought to have got his wife to institute a suit and to prove her title as against them. He ought never to have taken the decision of the question in his own hand, and I am of opinion that he is by his own conduct and action estopped from questioning plaintiffs' title to redeem the land from him.

The finding of the Subordinate Judge that defendant 2 had no title to redeem from defendant 1 was based on the following grounds :—

Rau is and has always been living with her husband. There is admittedly no ill-will or disagreement between them. She must have known from her husband how the matters stood. She must have had therefore constructive as well as actual notice that the plaintiffs laid claim to the equity of redemption and that the said equity of redemption had actually passed to them. For all that she remained quiescent for a period of more than eighteen years before she assigned the equity of redemption to defendant 2. But her claim to the equity of redemption had been by that time time-barred and extinguished. Defendant 2 can have therefore no title to redeem the land.

On appeal by defendant 2 the Judge confirmed the decree observing that :—

I gravely doubt whether short of actual redemption to the knowledge of the person entitled to redeem, there can be any adverse possession of an equity of redemption in this country, barring the remedy, yet in this case I should be inclined to support the judgment of the lower Court upon quite a different ground and one which seems to me more intelligible and secure, *viz.*, estoppel. It is conceded that when the plaintiff put himself forward as owner and incurred the liability of Rs. 800 under his renewal the true owner was perfectly aware of what he was doing, and acquiesced in it. It may very well be said now that she may not dispute the right which she then deliberately countenanced.

Defendant 2 preferred a second appeal.

Narayan V. Gokhale, for the appellant (defendant 2).

Daji A. Khare, for the respondents (plaintiffs).

JENKINS, C. J.:—This is a suit for redemption based on a mortgage of the 22nd June, 1882, and the facts, which are the occasion of the dispute, are briefly as follows. On the 2nd October, 1873, Durgan, the widow of one Govinda, mortgaged to Godaji, defendant 1, with possession, the land in suit for Rs. 900. In 1882 she died leaving a daughter Rau, the wife of Godaji.

1903.

PURSHOTAM
v.
GADAJI.

The plaintiffs, however, as the nearest *Waras Bhanbands* of Govinda, claimed on his widow's death to have succeeded to the land, and, in accordance with a notion which is said to have been then prevalent, they were accepted by those concerned as Govinda's heirs in preference to his daughter. This was an error, still even Godaji assented to this view, for by way of compromise, on their disputing the validity of the mortgage as against themselves, he accepted from the plaintiffs the mortgage, on which they now sue, in the place of Durgan's, and remitted in their favour Rs. 100, so that the amount secured under the new mortgage was Rs. 800.

In 1889, however, when possibly the true legal position had been ascertained, Rau sold to the 2nd defendant what was alleged to be her equity of redemption, and the 2nd defendant in his turn paid off Godaji the mortgage, and so claims to have redeemed the property.

The Subordinate Judge decided in the plaintiffs' favour, holding that Rau's claim to the equity of redemption had become barred, and he passed a decree that the plaintiffs do recover possession of the mortgaged land, and pay the 2nd defendant Rs. 800 in complete discharge of the mortgage of the 23rd of June, 1882, as therein provided.

This decree was confirmed on appeal by the District Judge, but he rested his decision not on the bar of limitation but on estoppel. We agree with the conclusions of the lower Courts, but we prefer to support our view on the reasoning of the Subordinate Judge. Durgan's mortgage was voidable in the absence of justifying circumstances, and as between Godaji and the plaintiffs it was treated as having come to an end, so that for the future Godaji held the property as mortgagee from the plaintiffs, and his possession must be attributed to a right derived from them; for it has been found as a fact that Rau was aware of what was being done and acquiesced in it. Though therefore Godaji's possession in its inception was not by virtue of a right derived from the plaintiffs still, on the facts found, his possession was from the 22nd of June, 1882, under colour of a right derived from the plaintiffs and so adverse to Rau and that to her knowledge. It may be that Godaji thus took possession under a mistake common to all as to Rau's rights, but that did not make

1903.
PURSHOTAM
v.
SAGAJI.

the possession any the less adverse to Rau: *Cholmondeley v. Clinton*.⁽¹⁾

Any title that Rau may have had thus became extinguished and as against the mortgagee Godaji and anyone claiming under him; the right to redeem the property is in the plaintiffs. The decree of the lower Appellate Court must, therefore, be confirmed with costs.

Decree confirmed.

(1) (1821) 4 Bligh N. S. 103.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Jacob.

1903.
August 12.

VINAYAK MAHADEV GHATE (ORIGINAL DEFENDANT NO. 2), APPELLANT, v. LAKSHMAN NARAYAN BHAGWAT (ORIGINAL PLAINTIFF), RESPONDENT.*

LAKSHMAN NARAYAN BHAGWAT (ORIGINAL PLAINTIFF), APPELLANT, v. VINAYAK MAHADEV GHATE (ORIGINAL DEFENDANT NO. 2), RESPONDENT.*

Inamdar—Arrears of assessment—Occupancy tenant—Purchaser from the occupancy tenant—Decree for assessment—Money decree against the occupants—Charge on land.

The plaintiff, an Inamdar, sued to recover assessment due for the years 1895-96 and 1896-97 from defendant 2 who came in as a purchaser from the original occupancy tenant on the 5th April, 1899. The lower Courts passed a personal decree against defendant 2 for the arrears of assessment.

Held, that defendant 2 was not liable, since an Inamdar suing for assessment was not entitled to a charge on the lands but only to a money decree against the occupants.

Ratanji v. Sakharam (1) followed.

CROSS-APPEALS from the decision of V. V. Phadke, First Class Subordinate Judge, A. P., at Thána, varying the decree passed by R. B. Chitale, Subordinate Judge of Pen.

The plaintiff, an Inamdar, brought this suit on the 10th December, 1897, to recover assessment due for the years 1895-96

* Cross-appeals Nos. 78 and 103 of 1902.

(1) (1884) P. J. p. 68.

and 1896-97. The suit was originally brought against Vinayak Vishnu Joshi (defendant 1) alone. The plaintiff subsequently applied to join as additional defendant Vinayak Mahadev Ghate (defendant 2), on the ground of his having purchased the interest of the original defendant at an auction-sale on the 5th April, 1899. Defendant 3 was added on the ground that he held half the land on a partition effected between the parceners.

Defendant 2 contended, *inter alia*, that as he purchased the land in 1899 he was not liable for the arrears.

The Subordinate Judge passed a decree in plaintiff's favour, directing him to recover the assessment due from defendants 2 and 3.

On appeal, the lower Appellate Court held that the assessment was a charge on the land and the purchaser purchased the land *pendente lite* and defendant 2 was, therefore, responsible for the arrears of assessment. The Court further held that the claim against defendant 3 was time-barred.

Plaintiff and defendant 2 preferred cross-appeals to the High Court.

APPEAL No. 78 OF 1902.

G. S. Rao, for the appellant.

M. B. Chaubal, for the respondent.

APPEAL No. 108 OF 1902.

M. B. Chaubal, for the appellant.

V. N. Manohar, for the respondents.

CHANDAVARKAR, J. :—The District Judge has passed a personal decree against defendant 2, although admittedly defendant 2 came in as purchaser on the 5th April, 1899, and the suit is in respect of assessment due for the years 1895-96 and 1896-97. Obviously, therefore, the decree against defendant 2 must be set aside. The lower Appellate Court seems to have passed the decree against defendant 2, under the impression that the amount of assessment for 1895-96 and 1896-97 was a charge upon the land. But an Inamdar is not entitled to a charge on the lands but only to a money decree against the occupants, as was held

1903.

VINAYAK
v.
LAKSHMAN.

1903.

VINAYAK
v.
LAKSHMAN.

in *Ratanji v. Sakharan*.⁽¹⁾ Following that ruling we reverse the decree of the lower Appellate Court against defendant 2.

Defendant 2 should have his costs of this appeal and of the appeal to the lower Appellate Court. We make no order as to the costs in the first Court.

With regard to the points raised in Second Appeal No. 108 of 1902, we think that we are bound by the decision in *Sadashiv v. Ramkrishna*,⁽²⁾ and the six years' rule must apply.

In accordance with that decision we vary the decree of the lower Appellate Court and direct that the plaintiff do recover Rs. 36-4-0 out of the amount claimed in the plaint with interest thereon at 9 per cent., from the date of the suit to the date of satisfaction, from defendant 3, Damodar Narayan Joshi, with costs in proportion throughout.

Decree varied.

(1) (1884) P. J. p. 68.

(2) (1901) 25 Bom. 556.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

1903.

August 17.

NINGAWA KOM NINGANGAVDA MANTUR AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, v. RAMAPPA AND FOUR OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Misjoinder of parties—No adverse interest as between the parties—Limitation Act (XV of 1877), schedule II, article 119—Adoption—Suit to declare validity of adoption—Interference with adopted son, nature of.

Plaintiff 1, the daughter of Ningangavda, and plaintiff 2, the adopted son of Ningangavda, together brought a suit against the defendants to recover possession of Ningangavda's property. The right alleged in plaintiff 1 was that she had been living with plaintiff 2, in the house of which possession had been given to the first defendant under a decree of the Māmlatdār. The plaint contained no averment asking for relief in favour of plaintiff 1 in the event of plaintiff 2's adoption being found not proved. On an objection having been raised as to misjoinder of parties,

* Appeal No. 6 of 1902.

Held, that the suit was not bad for misjoinder of parties, since plaintiff 1, beyond alleging in the plaint that she was Ningangavda's daughter, did not set up her right to recover the property as Ningangavda's daughter, but claimed it with plaintiff 2, on the ground that the latter was Ningangavda's son, and that she lived with him.

Fakirapa v. Rudrapa (1) followed, and *Lingammal v. Chinna* (2) distinguished.

Article 119 of schedule II of the Limitation Act (XV of 1877) applies to a suit "to obtain a declaration that an adoption is valid"; and there are no words in it making it applicable to a suit for a declaration that an alleged adoption did take place. The article is, therefore, to be applied only where the question is not as to the *factum* but the validity of an adoption. The interference mentioned in the article as a condition of its application so as to bar the plaintiffs' right altogether is obviously an interference which must amount to an absolute denial of the status of adoption held by a plaintiff and an unconditional exclusion of him from the enjoyment of his rights in virtue of that status. The article can have no application to a case where the facts suggest that the interference, such as it was, was intended to have no greater effect than that of postponing the right of the adopted son to succeed as heir to the property of his adoptive father.

APPEAL from the decision of Raghavendra Ramchandra Gangolli, First Class Subordinate Judge, at Dhárwár.

Suit to obtain a declaration of title to certain property.

The property in dispute belonged to one Ningangavda, who had two wives, Bharmawa and Lingawa. By Bharmawa he had one daughter, Sangawa (plaintiff No. 1). Lingawa was childless. Sangawa had two sons, Maritamappa and Kurgodigavda. Of these, Maritamappa was adopted as a son by Ningangavda in 1875; but the boy died in a few months after the adoption. Ningangavda then adopted Kurgodigavda in December, 1877, who was then two years old.

Ningangavda died on the 14th January, 1878, leaving behind him his daughter Sangawa and his widow Lingawa. Since this time forward the property was managed by Lingawa, who, on the 23rd July, 1878, appointed Ningangavda Mantur (her own brother) as manager of the property. This Ningangavda Mantur continued to manage the property till his death in March, 1898. Lingawa died on the 14th September, 1898. At her death, Ningawa (defendant 1), a widow of Ningangavda Mantur,

1903.

NINGAWA
v.
RAMAPPA.

(1) (1891) 16 Bom. 119.

(2) (1882) 6 Mad. 239.

1903.
NINGAWA
v.
RAMAPPA.

asserted title to the property, alleging that her son Ningangavda (defendant 2) was adopted by Lingawa on the 8th September, 1898, a few days before the latter's death.

In the month of December, 1898, Ningawa filed a possessory suit to recover possession of the family house, in the Court of the Mámlatdár, under the provisions of Bombay Act III of 1876 : she obtained a decree in her favour and took possession of the house.

In January, 1899, the plaintiff 1 (the daughter of Ningangavda) and plaintiff 2 (the adopted son of Ningangavda) filed a suit against the defendants to obtain a declaration of this title to the properties mentioned in the plaint, which were in their own possession, and an order setting aside the order made by the Mámlatdár and directing that possession of the said house be delivered back to the plaintiffs. The plaint alleged that the adoption set up by defendant 1 was fictitious.

To this suit, the co-widow of defendant 1 (defendant 3), and the second son of defendant 1 (defendant 4) were added as parties.

Defendants 1, 2 and 4 contended (*inter alia*) that plaintiff 2 was not the adopted son of Ningangavda ; that the suit was bad for misjoinder of parties ; that it was barred by limitation, and that defendant 2 was the adopted son of Ningangavda having been adopted by Lingawa with all necessary rites on the 8th September, 1898.

The Subordinate Judge found that plaintiff 2 was the adopted son of Ningangavda, and that defendant 2 was not adopted. He also held that the suit was not bad for misjoinder of parties and that it was not barred by limitation.

The defendants appealed to the High Court.

Branson (with him *S. R. Bakhale*), for the appellants (defendants) :—The first defect in the frame of the suit is the misjoinder of parties. There are two plaintiffs, the adopted son and his mother, the daughter of the last male holder. Their claims are inconsistent with each other. The daughter can only succeed if the adoption is held to be bad. Thus the parties that join as co-plaintiffs are persons who can never be allowed to join together in a suit of this kind.

Not only is there misjoinder of parties, but also a misjoinder of causes of action. For the daughter's cause of action arose after the death of the widow, while that of the adopted son arose on his adoption. Such a course is not allowable. Section 26 of the Civil Procedure Code (Act XIV of 1882) allows a joinder of co-plaintiffs only when they claim in respect of the same cause of action. This being the course, the only way out of the difficulty is to follow the ruling in *Lingammal v. Chinna*.⁽¹⁾ This Court should therefore quash all previous proceedings, and send down the case for the parties to elect to go to Court in a properly framed suit. The case of *Fakirapa v. Rudrapa* ⁽²⁾ is distinguishable. In *Haramoni Dassi v. Hari Churn Chowdhry* ⁽³⁾ it is said that antagonistic claims should not be allowed to be joined in one suit.

1903.

 NINGAWA
 v.
 RAMAPPA.

Shamrao Vithal, for the respondents :—The cause of action in the present suit is the Mámlatdár's decision : the rights of the different plaintiffs may be different, but the cause of action is the same and if by way of a mere matter of caution other plaintiffs are joined in the suit, the suit would not be bad : see *Bachubai v. Shamji Jadovji*.⁽⁴⁾ There again the case of *Fakirapa v. Rudrapa* ⁽²⁾ is on all fours with the present. The daughter is willing to stand by the second plaintiff's adoption and as this is a regular appeal, this Court should allow the plaintiffs to make a choice here instead of sending down the case for that purpose. In R. A. 112 of 1900 (unreported) such a course was allowed by Fulton and Crowe, JJ.

Branson, in reply :—The Mámlatdár's decision affected only a portion of the property, and therefore it cannot be the cause of action for the whole claim made in this suit. As to the amendment proposed to be made here, it will be seen that in *Lingammal v. Chinna* ⁽¹⁾ that question was considered and given up as the Courts had not the power to allow such amendment.

S. R. Bakhale, then addressed the Court on the question of limitation :—Ningangavda died on the 14th January, 1878. He

(1) (1882) 6 Mad. 239.

(2) (1891) 16 Bom. 119.

(3) (1895) 22 Cal. 833.

(4) (1835) 9 Bom. 536.

1903.

NINGAWA

v.

RAMAPPA.

adopted the plaintiff 2 before his death. Ever since his adoption, the widow of Ningangavda has ignored the adoption and been in possession of the property in her own rights. These acts were adverse to the plaintiff 2's rights commencing almost from the date of his adoption. The plaintiff 2 ought to have brought a suit within six years from 1878 for a declaration of his rights or within twelve years of that date for possession of the property. But as the plaintiff 2 was a minor at the time, he could not bring the suit then. He had, therefore, three years from the date of attaining his majority to bring such a suit. He became a major in 1893; and ought to have brought his suit before 1896. The present suit is in 1899, which is clearly beyond time. Whatever rights plaintiff 2 had became extinguished in 1899.

Shamrao Vithal, for the respondents:—Plaintiff 2 was not excluded by the widow of Ningangavda. He was educated and married with the family funds and continued to live in the same house. Therefore no bar of limitation can come in his way.

CHANDAVARKAR, J.—The determination of the question whether the suit is bad for misjoinder of causes of action by reason of the fact that plaintiff No. 1 is suing as the daughter of Ningangavda and plaintiff No. 2 as his adopted son and that the title of the one is inconsistent with and antagonistic to that of the other would have been essential had plaintiff No. 1 not accepted plaintiff No. 2's adoption in the plaint but set up her own right to the property in dispute as the heir of Ningangavda in opposition to plaintiff No. 2's right. It is true that at the end of paragraph 11 of the plaint it is alleged that both the plaintiffs are owners and that in paragraph 12 the prayer is for a declaration of the ownership of the plaintiffs as against the defendants. But there is no allegation in the plaint asking for relief in favour of plaintiff No. 1 in the event of plaintiff No. 2's adoption being found not proved. The right alleged in plaintiff No. 1 in paragraph 3 and repeated in some of the other paragraphs of the plaint is that she has been living with plaintiff No. 2. Paragraph 4 states that when Ningangavda died, plaintiff No. 2 was a minor and the management of *his* house and affairs was carried on by Ningangavda's widow. In paragraph 7 the allegation is that the

1903.

NINGAWA
v.
RAMAPPA.

defendants took possession of the house under a Mámlatdár's decree fraudulently obtained during plaintiff No. 2's absence. Reading the plaint as a whole, we take it as one brought substantially to vindicate plaintiff No. 2's adoption and plaintiff No. 1 is joined because she resided with plaintiff No. 2 in the house, which is one of the properties claimed and from which both the plaintiffs were dispossessed by the defendants under a Mámlatdár's order. She claims under rather than in opposition to plaintiff No. 2. The suit, therefore, falls within the principle of the ruling of this Court in *Fakirapa v. Rudrapa* ⁽¹⁾ by which we are bound and where it was said:—"Both the plaintiffs are jointly interested in disproving the alleged title of defendant No. 1 and in proving Irappa's exclusive title. As they both assert the adoption, their interests are in no way antagonistic and the suit is not bad because both their names appear on the record." That the suit is one brought by both the plaintiffs to establish plaintiff No. 2's adoption is clear also from the fact that whereas the Subordinate Judge has passed a decree directing the defendants to deliver possession to plaintiff No. 2, plaintiff No. 1 has not preferred any appeal from it in assertion of her right as Ningangavda's daughter, asking this Court that if it should, in the appeal preferred by the defendants, hold plaintiff No. 2's adoption not proved, it should consider her right as heir to Ningangavda and pass a decree in her favour. That shows that she has all along intended to stand or fall by plaintiff No. 2's adoption. In *Lingammal v. Chinna* ⁽²⁾ the first plaintiff claimed as one of the widows of the deceased and the second plaintiff as his adopted son and the decision went on the ground that the claim of the first plaintiff assumed there was no adoption. But in the present case, beyond alleging in the plaint that she is Ningangavda's daughter, plaintiff No. 1 does not set up her right to recover the property as his daughter, but claims it with plaintiff No. 2 on the ground that the latter is Ningangavda's son and that she lived with him and was dispossessed with him by the defendants under a Mámlatdár's order. We think, therefore, that the principle of the Madras ruling does not apply and the suit is not bad for misjoinder.

⁽¹⁾ (1891) 16 Bom. 119.⁽²⁾ (1882) 6 Mad. 239.

1908.

NINGAWA

v.

RAMAPPA.

[His Lordship after discussing the evidence and holding that the adoption of plaintiff No. 2 was proved continued.]

The question of limitation raised in this appeal now requires consideration. It was argued that the claim was barred either under article 119 or article 144 of schedule 2 of the Limitation Act—under article 119 because, it was contended, Lingava by setting up her right as heir to Lingangavda in 1878 must be taken to have interfered with the rights of plaintiff No. 2 as his adopted son and ordinarily the claim would have become barred in 1884, but as plaintiff No. 2 was a minor he had three years to sue from the time he arrived at the age of majority. He arrived at that age in 1891 and the contention is that the suit, which ought to have been brought at least in 1894, is barred, having been brought in 1899. And equally, it was said, the claim would be barred if the twelve years' period of limitation were applied to the case under article 144. As to article 119 it is to be remarked that it applies to a suit "to obtain a declaration that an adoption is valid"; and there are no words in it making it applicable to a suit for a declaration that an alleged adoption did take place. The omission of such words from the article in question is significant all the more because under article 118 a suit may be brought to obtain a declaration that an alleged adoption is invalid *or never in fact took place*. It is a legitimate inference to draw from the difference in the phraseology of the two articles that article 119 is to be applied only where the question is not as to the *factum* but the validity of an adoption. But assuming that article 119 applies in either case, under it the question would be whether what occurred in and as a consequence of the heirship inquiry amounted to an interference with the rights of plaintiff No. 2 as the adopted son of Ningangavda. It is true that Lingava, the widow of Ningangavda, ignored in the heirship inquiry the adoption of plaintiff No. 2 and set up her own right, but on the other hand plaintiff No. 2 lived with her and was brought up and treated by her as her adopted son. From that finding it follows that there was no such interference with plaintiff No. 2's rights as to bar his title to recover the property at any rate on the death of Lingava. Whether he could have succeeded in the present suit

had Lingava been alive and been sued is another question ; she had certainly held the property as the widow of Ningangavda to the exclusion of her adopted son plaintiff No. 2, as if her right was superior to his ; but her action and conduct till 1898 were not such as to exclude the plaintiff No. 2 absolutely and as against all, from his right to claim the property as her adopted son at any time. It was only in 1898 that she expressly and completely repudiated plaintiff No. 2's adoption and that indeed might give a cause of action to plaintiff No. 2 under article 119 so as to bar his right absolutely not only as against Lingava but as against the present defendants and all others claiming to be Ningangavda's heirs. But the events which happened till then prove no more than that Lingava held the property in her own right as widow subject to plaintiff No. 2's right to succeed her on her death as her adopted son. In that view of the case, which, we think, is the only reasonable view suggested by the facts which the Subordinate Judge has found and in which we concur, plaintiff No. 2's claim as against the present defendant is not barred either under article 119 or article 144 of the Limitation Act. The interference mentioned in article 119 as a condition of the application of that section so as to bar a plaintiff's rights altogether is obviously an interference which must amount to an absolute denial of the status of adoption held by the plaintiff and an unconditional exclusion of him from the enjoyment of his rights in virtue of that *status*. The article can have no application to a case where the facts suggest that the interference, such as it was, was intended to have no greater effect than that of postponing the right of the adopted son to succeed as heir to the property of his adoptive father. Further, upon the finding that plaintiff No. 2 lived with Lingava throughout, and was brought up by her as her adopted son, we must hold that he participated in the profits in that character and was not so excluded by Lingava as to make her possession adverse to him at any time : see *Raithamoni Debi v. The Collector of Khulna*.⁽¹⁾

[His Lordship then proceeded to deal with the question raised as to the ownership of certain properties and concluded.]

1903.

NINGAWA
v.
RANAPPA.

(1) (1900) L. R. 27 I. A. 136.

1903.

NINGAWA
v.
RAMAPPA.

We amend the decree of the Subordinate Judge by adding the words "except Revision Survey Nos. 44 and 149 both situate at Kadadi" after the words "the entire properties specified in the plaint" and before the words "to the plaintiff No. 2." The decree stands confirmed in other respects. Appellants to pay to the respondents the costs of this appeal.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

1903.

August 18.

ISHWAR LINGO DESAI (ORIGINAL PLAINTIFF), APPELLANT, v. GOPAL JIVAJI DESAI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Transfer of Property Act (IV of 1882), section 93—Redemption-decree—Failure to pay money on date fixed—Court's power to enlarge time for payment.

The failure to pay money on or before the date mentioned in the redemption-decree does not absolutely bar the mortgagor's right to obtain possession of the mortgaged property; since, the Court may, under section 93 of the Transfer of Property Act (IV of 1882) upon good cause shown, enlarge the time for payment upon such terms as it thinks fit.

The plaintiff within three years of the date of the decree produced in Court the decretal amount and prayed for possession of the mortgaged property.

Held, such an application could be treated as one for enlargement of time under section 93 of the Transfer of Property Act.

SECOND appeal from the decision of R. Knight, District Judge of Dhárwár, reversing the order passed by V. D. Joglekar, Subordinate Judge, at Hubli.

The plaintiff obtained a decree on the 30th November, 1898, to redeem a mortgage on payment of certain amount on or before the 23rd March, 1899, and obtain possession of the mortgaged property from the defendant, the mortgagee. The plaintiff failed to redeem the mortgage on or before the date fixed. The mortgagee also did not obtain an order from the Court declaring that the right of the mortgagor to redeem the mortgage was extinguished and the decree contained no provision to that effect.

* Second Appeal No. 241 of 1902.

At a later date, but within three years from the date of the decree, the plaintiff produced in Court the amount mentioned in the decree, and prayed for possession of the mortgaged property. It was contended by the defendant that the plaintiff had no right to redeem after the date fixed by the Court in the decree.

The Subordinate Judge decided "that the plaintiff has a right to obtain possession of the land and the amount paid in Court should be paid to the mortgagee as ordered by the decree."

This order was, on appeal, reversed by the District Judge on the following considerations:—

"The order of the lower Court is inconsistent with the terms of the decree, which binds plaintiff to perform a certain act by a certain date if he wishes to benefit by it. The effect of the order is to render the entry of the date in the decree wholly superfluous and meaningless. If plaintiff wished for an extension of the time for payment he should have applied under section 68 of the Transfer of Property Act. The rulings in *Maruti v. Krishna* (1 Bom. L. R. 31) and *Narayan v. Anandram* (1 L. R. 16 Bom. 480) have no application to the present case, inasmuch as they refer to decrees which did not fix any specific date for payment. On the other hand, *Murkidhar v. Parasharam* (2 Bom. L. R. 633) is conclusive in such a case as the present, *vide* remark on page 625."

The plaintiff appealed to the High Court.

G. S. Mulgaonkar, for the appellant (plaintiff):—Our contention is that we should be allowed to redeem the mortgaged property on the grounds that we produced the decretal amount in Court within three years from the date of the decree; and that the defendant-mortgagee did not obtain an order absolute on the plaintiff's failure to pay within the appointed time. The lower Appellate Court refused to allow us to do so on the ground that we failed to pay within the appointed time in the decree; and that if we so required we should have applied for an extension of time. The first ground is answered by reference to the last paragraph of section 93 of the Transfer of Property Act (IV of 1882): see also *Nandram v. Bahaji* ⁽¹⁾, *Kanara Kurup v. Gorinda Kurup* ⁽²⁾, and *Taniram v. Gajanan*. ⁽³⁾ The lower Appellate Court should have treated our present application as one for extending the time appointed in the decree.

(1) (1897) 22 Bom. 771.

(2) (1892) 16 Mal. 214.

(3) (1899) 24 Bom. 300.

1913.

ISHWAR
LINGO
v.
GOPAL
JIVANI.

1903.

[CHANDAVARKAR, J., referred to *Rango v. Bhomshetti*.⁽¹⁾]

ISHWAR
LINGO
v.
GOPAL
JIYAJI.

The case of *Murlidhar v. Parsharam* ⁽²⁾ is not against our contention: though it is difficult to understand the remark of Fulton, J., in that case, where his Lordship says: "Had he been out of possession he would doubtless have lost his right to recover possession when the time expired." There is no warrant for the remark in sections 92 and 93 of the Transfer of Property Act (IV of 1882)—*vide* also *Narayan v. Anandram* ⁽³⁾, *Maruti v. Krishna*.⁽⁴⁾

S. F. Bhandarkar, for the respondent (defendant):—The law is clearly laid down in *Mahant Ishwargar v. Chudasama Manabhai*.⁽⁵⁾

The mortgagor should have redeemed within the time appointed. The decree did not contain a default clause and therefore it was not necessary to obtain an order absolute.

G. S. Mulgaonkar, in reply:—The decision in *Mahant Ishwargar v. Chudasama Manabhai* ⁽⁵⁾ represents the law as it stood before the introduction of the Transfer of Property Act (IV of 1882) in Bombay.

CHANDAVARKAR, J.:—In this case we have already held on the record before us that respondent 1 having died, the cause of action survives to the other respondents who are alive.

The appeal has accordingly been heard on the merits.

We do not agree with the District Judge's view that because the plaintiff failed to pay the amount of the decree to the defendants within the period fixed therein, he has lost his right to obtain possession on the payment of the redemption-money after that period. The District Judge has overlooked the proviso to section 93 of the Transfer of Property Act, which says: "The Court may upon good cause being shown and upon such terms, if any, as it thinks fit from time to time postpone the day fixed under section 92 for payment to the defendant."

The Subordinate Judge allowed the *darkhast* to proceed. The question which ought to have been considered in this *darkhast* is whether good cause was shown by the plaintiff for

(1) (1901) 26 Bom. 121.

(3) (1891) 16 Bom. 480.

(2) (1900) 25 Bom. 101.

(4) (1899) 23 Bom. 592; (1899) 1 Bom. L. R. 31.

(5) (1888) 13 Bom. 106.

enlarging the time fixed in the decree, and whether, if time ought to be enlarged, the plaintiff ought to be put on any terms. The plaintiff, it is true, did not make any application expressly for an enlargement of the time; but following *Rango v. Bhomshetti* ⁽¹⁾ we think his present application may well be treated as one made for such enlargement to be followed by an order for the execution of the decree. The *darkhast* ought to be dealt with from that point of view, and the Appellate Judge should consider, after taking or directing to be taken by the Subordinate Judge, such evidence as the parties may adduce, firstly whether there is good cause shown for enlarging the time fixed by the decree, and then, if he is of opinion that it should be enlarged, whether the plaintiff ought to be put on any terms.

We reverse the decree of the lower Appellate Court and remand the *darkhast* for disposal with reference to the remarks made above.

Costs to follow result.

Decree reversed. Darkhast remanded.

(1) (1901) 26 Bom. 121.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Aston.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL PLAINTIFF), APPELLANT, *v.* BALVANT GANESH OZE (ORIGINAL DEFENDANT), RESPONDENT.*

1903.

August 19.

Bombay Irrigation Act (Bom. Act VII of 1879), sections 3, sub-section (2), 5, 8, 23, 27, 28 (1)—Nālā—Water-course—Canal—Irrigation Department—Right to control water or to obstruct the use thereof—Riparian Proprietor—Enjoyment and benefit of water—Strict construction of statutes encroaching on the rights of subjects.

The defendant was in possession of a plot of land, Survey No. 13, and a *nālā*, that is, a water-course, ran past that plot of land. The *nālā* was crossed at a

* Appeal No. 86 of 1902.

(1) Sections 3, sub-section (2), 5, 8, 23, 27, 28 of the Bombay Irrigation Act (Bom. Act VII of 1879):

3. In this Act, unless there will be something repugnant in the subject
B 1542—1

1903.

SECRETARY
OF STATE
v.
BALYANT
GANESH.

considerable distance to the north of the defendant's land by a Government Irrigation Canal. The water flowing in the *nālā* was derived from two sources: (1) from the rain water from the hills and catchment area of the *nālā*, and (2) from percolation of water or waste from the canal. Apart from abnormal periods of drought, the second of the two sources was perennial and the more

or context,—

(1) "canal" includes

- (a) all canals, channels, pipes and reservoirs constructed, maintained or controlled by Government for the supply or storage of water ;
- (b) all works, embankments, structures, and supply and escape channels connected with such canals, channels, pipes or reservoirs, and all roads constructed for the purpose of facilitating the construction or maintenance of such canals, channels, pipes or reservoirs ;
- (c) all water-courses, drainage-works and flood-embankments as herein-after respectively defined ;
- (d) any part of a river, stream, lake, natural collection of water, or natural drainage channel, to which the Governor in Council may apply the provisions of section 5 or of which the water has been applied or used before the passing of this Act for the purpose of any existing canal ;
- (e) all land belonging to Government which is situate on a bank of any canal as hereinbefore defined, and which has been appropriated, under the orders of Government, for the purposes of such canal.

(2) "water-course" means any channel or pipe not maintained at the cost of Government, which is supplied with water from a canal, and includes all subsidiary works connected with any such channel or pipe, except the sluice or outlet through which water is supplied from a canal to such channel or pipe.

5. Whenever it appears expedient to the Governor in Council that the water of any river or stream flowing in a natural channel, or of any lake, or any other natural collection of still water should be applied or used by the Government for the purpose of any existing or projected canal.

The Governor in Council may, by notification in the *Bombay Government Gazette*, declare that the said water will be so applied or used after a day to be named in the said notification, not being earlier than three months from the date thereof.

8. Any canal officer duly empowered in this behalf and any person acting under the general or special order of any such canal officer may enter upon any land, building, or water-course, on account of which any water-rate is chargeable, for the purpose of inspecting or regulating the use of the water supplied, or of measuring the land irrigated thereby or chargeable with a water-rate, and of doing all things necessary for the proper regulation and management of the canal from which such water is supplied.

23. On receipt of any such application the canal officer shall serve notice on the owner to show cause why such authority should not be granted, or such declaration

important of the two. Before the canal was made there was a surface flow in a portion of the *nālā* and this flow lasted through the rains and for a portion of the cold weather and there was no flow after December. For seven hundred yards below the point of contact of the canal and the *nālā*, the *nālā* was normally dry and gravelly for many months, but at a point some seven hundred yards lower down the canal there was a spring and thence downwards there was a perennial stream. The *nālā*, however, throughout the rainy months held a fair body of water. In the year 1897, the Irrigation Department put a dam across the *nālā* and thereby infringed the defendant's riparian rights. The defendant thereupon brought a summary suit against the Executive Engineer for Irrigation and his subordinates in the Court of the Māmlatdār of Haveli for the removal of the dam and obtained a decree in his favour. Thereupon, the Secretary of State for India, as plaintiff, brought the present suit against the defendant praying that his right to control the water in the water-course (*nālā*) in suit and to obstruct the use of such water therein by the defendant

1903.

SECRETARY
OF STATEv.
BALVANT
GANESHI.

should not be made and, if no objection be raised, or if any objection be raised and be found insufficient or invalid, shall, subject to the approval of the Collector, either authorize the applicant to use the water-course, or declare him to be a joint owner thereof on such conditions as to the payment of compensation or rent or otherwise as may appear to him equitable.

27. Every person desiring to have a supply of water from a canal shall submit a written application to that effect to a canal officer duly empowered to receive such applications, in such form as shall from time to time be prescribed by Government in this behalf.

If the application be for a supply of water to be used for purposes other than those of irrigation, the canal officer may, with the sanction of Government, give permission for water to be taken for such purposes under such special conditions and restrictions as to the limitation, control and measurement of the supply as he shall be empowered by Government to impose in each case.

28. The supply of water to any water-course or to any person who is entitled to sue supply shall not be stopped except—

- (a) Whenever and so long as it is necessary to stop such supply for the purpose of executing any work ordered by competent authority;
- (b) whenever and so long as any water-course by which such supply is received is not maintained in such repair as to prevent the wasteful escape of water therefrom;
- (c) whenever and so long as it is necessary to do so in order to supply in rotation the legitimate demands of other persons entitled to water;
- (d) whenever and so long as it may be necessary to do so in order to prevent the wastage or misuse of water;
- (e) within periods fixed from time to time by a canal officer duly empowered in this behalf, of which due notice shall be given.

1903.

SECRETARY
OF STATE.P.
BALVANT
GANESH.

subject to the conditions imposed by the Bombay Irrigation Act (Bomb. Act VII of 1879) should be declared. The first Court rejected the suit. The plaintiff having appealed,

Held, confirming the decree, that the water-course with which the defendant was concerned was a stream as that word is legally understood. It was a natural channel and not one constructed under the provisions of the Bombay Irrigation Act. It was not in direct communication with the canal; there was no agreement, for the supply of water under the Act and such water (if any) as found its way from the canal into it, came there by percolation. The defendant got the water from the canal, not because he was entitled to it, but because it came to him, and it would be open to the canal authorities to take such measures as would prevent the percolation.

As defendant had the right of a riparian proprietor to the usufructuary interest in the water in the *nālā*, which was incidental to the possession of the adjacent soil, it followed that whatever might be the nature of the tenancy, he as the occupant of the land abutting on the stream, and not the Government, was entitled to the enjoyment and benefit of the water as it flowed past.

A natural stream, though its flow of water be in part derived by percolation from a canal, is not a canal until the Governor in Council has applied to it the provisions of section 5 of the Bombay Irrigation Act.

Statutes which encroach on the rights of subjects whether as regards person or property must receive a strict construction.

APPEAL from the decision of F. C. O. Beaman, District Judge of Poona, in original suit No. 1 of 1901.

Suit for a declaration of right to control water in a *nālā* (water-course) and to obstruct the use of water therein by the defendant.

The plaintiff alleged that—In the second half of the 24th mile of the Mutha Right Bank Canal in the Poona District, a *nālā* crossed the canal and was taken under it by a culvert. After crossing the canal the *nālā* passed through the lands of village Loni Kalbhar in Haveli Taluka. The canal came into operation in this part of the district about the year 1877. Since then leakage water of the canal and of the distributary channels found its way into the *nālā* and the supply in the *nālā* had become perennial and was utilized for irrigation. Low earthen dams were erected across the *nālā* to divert the stream for irrigation.

One Narayan Shankar Javeri had been irrigating his field, Survey No. 17, for a long time in this way and twenty other cultivators had used the leakage at some time or other and paid water rates to the Irrigation Department.

The *nálá* in dispute had a drainage area of $1\frac{1}{2}$ square miles, of which only about half a mile was above the canal. Except during and for a few days after actual rainfall there was no natural flow in the *nálá*. The *nálá* bed was usually dry above the canal, but there was a constant supply in the bed below the canal and its irrigation distributaries. The *nálá* was a water-course within the meaning of section 3, clause (2), of the Irrigation Act (Bombay Act VII of 1879).

In 1891 the defendant acquired Survey No. 13 which was next to the abovementioned Survey No. 17 lower down the water-course which ran through it (Survey No. 13) also.

On the 3rd June, 1897, the defendant obtained a decree in the Court of the Mámílatdár of Haveli against the said Narayan Shankar Javeri, owner of Survey No. 17, for the removal of a dam put by him across the said *nálá* and the said dam was accordingly removed by the village officers. Thereupon, in June 1897, an earthen dam was erected under the order of Mr. LeQuesne, who was Executive Engineer for Irrigation at the time. This was done to give water to the said Narayan Shankar Javeri, who had applied for water, and to prevent the water going down to the defendant, who had not so applied and who was not willing to pay water-rate.

The defendant then instituted a summary suit, No. 5 of 1898, in the Court of the Mámílatdár of Haveli against the Executive Engineer for Irrigation and his three subordinates for the removal of the dam. The Mámílatdár decided the suit against the Irrigation Department on the 22nd July, 1899.

The plaintiff contended that the defendant (plaintiff before the Mámílatdár) had no right to the user referred to in the order passed in the summary suit, that the water of which the defendant claimed the user was water derived by surface flow through the *nálá*, by percolation or leakage from the canal, and that the defendant was neither duly authorized to use the *nálá* as a water-course, nor entitled as of right and without any application, to a supply of water under the Act, that the *nálá* being supplied with water from the canal, thereby became a water-course within the meaning of sub-section (2) of section 3 of the Bombay Irrigation Act of 1879 and was included within the definition of a canal under clause (c) of sub-section 1 of

1903.

SECRETARY
OF STATE
v.
BALYANT
GANESH.

1903.

SECRETARY
OF STATE
v.
BALVANT
GANESH.

section 3, that the canal officer had, therefore, power to do all things necessary for the proper regulation and management thereof under section 8 of the Act, and under section 28 of the Act was competent to stop the supply to the defendant under clause (c) of that section in order to supply the legitimate demands of those entitled to receive water for their lands and that the cause of action accrued on the 22nd July, 1899, the date of the Mámlatdár's decision in the summary suit.

The plaintiff prayed that—(a) His right to control the water in the said water-course and to obstruct the use of such water by the defendant, except under conditions imposed by the Bombay Irrigation Act, 1879, should be declared; (b) the cost of the suit might be awarded to the plaintiff; and (c) all orders necessary for granting adequate relief and for doing full justice might be passed.

The defendant contended that—(1) The suit could not lie in the form it was brought. (2) The suit was barred by section 42 of the Specific Relief Act (I of 1877). (3) The plaintiff was not entitled to the relief he claimed unless and until the Mámlatdár's order in the summary suit was set aside. (4) Survey No. 13 at Loni Kalbhar belonged to him (defendant). On the 27th July, 1891, the said survey number was transferred to him by the Forest Department in exchange of Survey No. 55 with all rights of ownership over the land, trees and wells, water-courses, &c., comprised within the boundaries of the said Survey No. 13. (5) Through the said Survey No. 13 there ran a *nálá* which took its rise in the hills to the south of Loni and after flowing through several fields ultimately discharged itself into the Mutha Mula river. (6) The Mutha canal crossed the *nálá* at the distance of over a mile from the said Survey No. 13. (7) The said *nálá* was a natural stream and had been in existence from time immemorial. The water of the said *nálá* was a natural spring water and was not derived by leakage or percolation from the irrigation canal or its distributaries by surface flow or otherwise. (8) The said *nálá* was not a "water-course" or a "canal" as defined by section 3 of the Bombay Irrigation Act and the Irrigation authorities had no right to regulate or stop its water-supply under section 8 or 28 of the Act. (9) The defendant was the owner of

the *nálá* so far as it passed through his land and was entitled to the use and enjoyment of the water of the *nálá* without obstruction by the plaintiff or his subordinates. (10) Even assuming that any water flowed into the said *nálá* by leakage or percolation from the main canal or its distributaries, the irrigation authorities had no right to follow it up and claim it as their own. (11) There had been a dispute for many years between the defendant and the Irrigation Department about the use of the water of the said *nálá*. The question was pending the consideration of the Revenue authorities. The suit, therefore, could not lie until the defendant's appeal from the order of the Revenue Commissioner, Central Division, No. R-3906 of 1895, dated the 23rd September, 1885, was finally decided by Government. (12) On the 18th July, 1896, Mr. H. T. Ommannay, Collector of Poona, after a careful investigation held that the Irrigation Department had no right to claim any leakage or percolation rates from the defendant for the use of the water of the *nálá*. On the 10th April, 1899, the High Court of Bombay decided (*see* 23 Bom. 761) that the Irrigation Department had no right to obstruct the defendant in using the water of the *nálá* by erecting a dam across the bed of the stream. Notwithstanding these decisions the present suit was filed without any cause of action. It should, therefore, be dismissed with costs.

The Judge found that the suit was defective by reason of the plaintiff not having asked for an injunction under section 42 of the Specific Relief Act (I of 1877) to stop the defendant's use of the water in question or to set aside the Mámlatdár's order, that the *nálá* in dispute was not a water-course or canal as defined in section 3 of the Bombay Irrigation Act, that the plaintiff was not estopped from disputing the defendant's right to the use of the water in question by reason of any transfer by Government to defendant of any right in Survey No. 13, that the suit was not premature by reason of the defendant having made an appeal to Government against the order of the Revenue Commissioner, dated the 23rd September, 1895, that the plaintiff had not proved his right to control the water of the *nálá* in suit and to obstruct the use of such water by the defendant except under the conditions imposed by the Bombay Irrigation Act.

1903.

SECRETARY
OF STATE
C.
BALVANT
GANESH.

1903.

SECRETARY
OF STATE
v.
BALWANT
GANESH.

The Judge having dismissed the suit, the plaintiff preferred an appeal.

Scott (Advocate General with *Ráo Bahádur V. J. Kirtikar*, Government Pleader) for the appellant (plaintiff).

Raikes (with *G. S. Ráo*) for the respondent (defendant).

JENKINS, C. J. :—The plaintiff by this suit prays that his right to control the water in the water-course mentioned in his' plaint, and to obstruct the use of the water therein by the defendant except under the conditions imposed by the Bombay Irrigation Act, 1879, should be declared. The defendant is in possession of Survey No. 13 in the village of Loni Kalbhar in the Haveli Táluka of the Poona District, and the water-course is a *nálá* that runs past that plot of land. One of the questions in the suit is whether the *nálá* is a canal within the meaning of the Bombay Irrigation Act of 1879, for if not, then plaintiff is not entitled to the declaration sought in this suit. The *nálá* is crossed at a considerable distance to the north of this survey number by the Mutha Right Bank Canal, which is a Government irrigation canal. On the *nálá* and between the canal and Survey No. 13 is Survey No. 17, which is in the occupation of Narayan Shankar Jaweri, a cultivator, who, for the purpose of irrigating his field, erected a dam in the *nálá*. On the 3rd of June, 1897, the defendant obtained a decree in the Court of the Mámlatdár of Haveli against Narayan for the removal of this dam, and the dam was accordingly removed by the village officers. In the same month an earthen dam was erected under the order of Mr. LeQuésne, the Executive Engineer for Irrigation at that time. The defendant Balwant thereupon instituted another suit in the Court of the Mámlatdár of Haveli, this time against the Executive Engineer for Irrigation and his three subordinates, for the removal of the dam. The Mámlatdár decided against the Irrigation Department on the 22nd of July, 1899. Hence it is that the present suit is brought. The District Judge of Poona has decided in the defendant's favour, and dismissed the suit. The Secretary of State has appealed to this Court, urging (amongst other things) that the Court below erred in holding that the *nálá* in question is not a water-course within the meaning of section 3 of the Bombay Irrigation Act of 1879. The essential facts in

the case have been ascertained by two Commissioners appointed by consent of the parties, and from their report it appears that the water flowing in the *nálá* is derived from two sources : (1) from rain water from the hills and catchment area of the *nálá*, and (2) from percolation water or waste from the canal. Apart from abnormal periods of drought, the second of the two sources is perennial and the more important of the two. The Commissioners, however, are of opinion that "there was a surface flow, in the portion of the *nálá* under consideration, before the canal was made, that this flow lasted through the rains and for a portion of the cold weather, and that there was no flow after December. This flow was certainly small and not considered sufficient for irrigation in those days. It may have been, and certainly did not exceed, four *mots* or about one-fourth cubic foot per second in the rains, two *mots* or about one-third cubic foot per second in the month of October, and one *mot* or about one-sixteenth cubic foot in the month of December."

It is only necessary to add, as the Judge has found, "that this *nálá* existed long before the canal; that the canal crosses it nearly a mile above the place where this dispute has arisen; that for seven hundred yards below the point of contact the *nálá* is normally dry and gravelly for many months, but that at a point some seven hundred yards lower down than the canal there is a spring, and that thence downwards there is a perennial stream; that quite apart and independent from that, the *nálá* does throughout the rainy months hold a fair body of water, and that it may be justly regarded as a source of water-supply as late as the end of November at least." These then are the facts on which this case must be determined.

Now it is clear that, apart from the Act under consideration the defendant has the right of a riparian proprietor to the usufructuary interest in the water, which is incident to the possession of the adjacent soil, and it follows that whatever may be the nature of the tenancy he, as the occupant of the land abutting on the stream, and not the Government, is entitled to the enjoyment and benefit of the water as it flows past: *The First Assistant Collector of Nasik v. Shamji Dasrath Patil*⁽¹⁾.

1903.

SECRETARY
OF STATE
v.
BALVANT
GANESH.

(1) (1878) 7 Bom. 209 at page 212.

1903.

SECRETARY
OF STATE
v.
BALVANT
GANESH.

But the defendant's riparian right has been infringed: so the only question is, whether that infringement is justified by the Act. It is a well established rule of construction that statutes which encroach on the rights of the subjects, whether as regards person or property, must receive a strict construction, and so in *Harrod v. Worship*⁽¹⁾ we find the Lord Chief Justice Cockburn says: "I have always understood according to the course adhered to by the Legislature, and according to the canon of construction in cases of this kind, that when the rights of individuals are to be interfered with, it is done by express enactment coupled with the provision giving compensation to those persons whose rights are to be interfered with." So again in the *Metropolitan Asylum District v. Hill*⁽²⁾ it is said by Lord Blackburn: "It is clear that the burden lies on those who seek to establish that the Legislature intended to take away the private rights of individuals, to show that by express words, or by necessary implication, such an intention appears." It is then with the guidance this canon of construction affords that we must approach the question now arising under the Bombay Irrigation Act of 1879. The prayer to the plaint is expressed in the widest possible terms, but it is clear from paragraph 7 of the plaint that the powers which are claimed in this suit are those under sections 8 and 28 of the Act, and the question therefore for us to decide is whether under those sections the canal officer was entitled to stop the supply to the defendant by erecting the dam of which complaint was made in the Mámlatdár's suit. The plaintiff's argument is that the *nálá* in question is a canal, inasmuch as by section 3 of the Act "canal" includes amongst other things all water-courses, and under section 3, sub-section 2, "water-course" means any channel not maintained at the cost of Government which is supplied with water from a canal and includes all subsidiary works connected with any such channel or pipe except the sluice or outlet through which water is supplied from a canal to such channel or pipe.

Now, section 8 provides as follows:—"Any canal officer duly empowered in this behalf and any person acting under the general or special order of any such canal officer, may enter upon

(1) (1861) 30 L. J. M. C. 165 at p. 167. (2) (1881) 6 A. C. 193 at p. 208.

any land, building, or water-course, on account of which any water rate is chargeable, for the purpose of inspecting or regulating the use of the water supplied, or of measuring the land irrigated thereby or chargeable with a water-rate, and of doing all things necessary for the proper regulation and management of the canal from which such water is supplied."

Power to inspect and regulate water-supply.

1903.

SECRETARY
OF STATE

2.
BALYANT
GANESH.

The marginal note therefore is somewhat misleading. This section only empowers a canal officer *to enter* on any land, &c., and in no way defines what he may do for the proper regulation and management of the canal

As we understand the facts of this case nothing turns on the mere entry by the canal officers on any lands; the grievance on the one side and the claim on the other are concerned with the erection of the bund, or, to be more accurate, with the hindrance thereby caused to the flow of water.

Now, the bund must manifestly have been erected under section 28, which provides:

"The supply of water to any water-course or to any person who is entitled to such supply shall not be stopped except

Power to stop water-supply.

(a) whenever and so long as it is necessary to stop such supply for the purpose of executing any work ordered by competent authority;

(b) whenever and so long as any water-course by which such supply is received is not maintained in such repair as to prevent the wasteful escape of water therefrom;

(c) whenever and so long as it is necessary to do so in order to supply in rotation the legitimate demands of other persons entitled to water;

(d) whenever and so long as it may be necessary to do so in order to prevent the wastage or misuse of water;

(e) within periods fixed from time to time by a canal officer duly empowered in this behalf, of which due notice shall be given."

The section then contemplates the supply of water (1) to a water-course, and (2) to a person.

But no question arises here as to the supply of water to the water-course: if there be a supply of water from the canal to the

1908.

SECRETARY
OF STATE
v.
BALVANT
GANESH.

water-course (as will for the sake of argument be assumed), that supply has not been stopped: what has been stopped is the flow of the water when in the water-course.

Therefore it is a supply to a person that has been stopped.

But then the section does not deal with the supply to *any* person, but only with the supply of water to any person *entitled to such supply*, and that must mean *entitled under the Act to such supply*.

Then is the defendant a person *entitled* to such supply? The Act does not in so many words define who is a person entitled to such supply, but we find in the Act indications of the conditions under which a person may become entitled to a supply of water.

Thus in the latter part of section 21 it is provided that every owner of a water-course and every person duly authorized under the provisions hereinabove contained to use a water-course shall be entitled to have a supply of water by such water-course.

We think it is clear that part III deals only with one class of water-courses, *i. e.*, those constructed under its provisions.

Under sections 23 and 27 a person may become *entitled to a supply*: and not only may there be an agreement for the supply of water, but also that agreement may be transferred (*see* section 30).

But the defendant comes within none of these descriptions: the water-course with which he is concerned is a natural channel, not one constructed under the provisions of the Act; it is not in direct communication with the canal; there is no agreement; and such water (if any) as may find its way from the canal into it comes there by percolation. Can it then be said that the defendant in respect of the water, which we assume may thus reach him by percolation, is *entitled to the supply* of such water? We think not: the defendant does not in respect of it allege an agreement or such ownership as is mentioned in part III of the Act, and it appears to us that even apart from any justifying provision in the Act, it would be open to the canal authorities to take such measures as would end the percolation. The defendant gets the water from the canal not because he is entitled to it, but because it comes to him.

On this line of reasoning therefore it appears to us that the defendant is not a person entitled to a supply of water within the meaning of section 28, so that, so far as warrant for stopping the flow of water to him is based on anything contained in that section, it is of no avail.

There is another mode of viewing the case leading to the same result, and with this we will now deal.

It has been argued that this *nālā* is a canal; but manifestly on the facts it is not that, unless the definitions of the Act make it so. In support of the argument that they do, it is pointed out that "canal" includes all *water-courses*, and a *water-course* is defined to mean "any channel or pipe not maintained at the cost of Government, which is supplied with water from a canal and includes all subsidiary works connected with any such channel or pipe except the sluice or outlet through which water is supplied from a canal to such channel or pipe."

Though the word *water-course* in its natural and ordinary meaning is the course of water, it may mean not only the flowing of water in its ordinary course, but the corporeal thing through which the water flows (*Taylor v. Corporation of St. Helens*⁽¹⁾), and here we have it expressly provided that it means a channel. Now the word channel would *prima facie* include the *nālā*, for its primary meaning is the bed of a stream of water, or the course or hollow in which a stream flows. But, we think, some restriction must be placed on the meaning of the word channel. If no restriction be placed on the word channel it would include a river or stream, and if we accept the plaintiff's argument that by the entrance into the river or stream of water by percolation (be it ever so little) from the canal the river or stream is supplied with water from the canal within the meaning of sub-section 2, then such river or stream would be a canal without the application by the Governor in Council of the provisions of section 5. But we cannot so read the Act: in relation to the water of any river or stream flowing in a natural channel there would almost of necessity be both natural and conventional rights, sometimes of great value, and it

1903.

SECRETARY
OF STATE
v.
BALVANT
GANESH.

(1) (1877) Ch. D. 264.

1903.

SECRETARY
OF STATE
v.
BALYANT
GANESH.

appears to us that the intention of the Legislature must have been that those rights should be dealt with only under section 5. Any other conclusion might involve a most serious inroad on private right without any provision for compensation: by reason of a small and useless leakage into a river in which valuable riparian rights exist it would, if the plaintiff be right, become a canal with the result that those rights would within the provision of the Act be under the control of the canal authorities with the far reaching consequences that involves.

The learned District Judge and Counsel before us have also placed stress on the words "which is supplied with water" as negating the plaintiff's contention, and we think they are not without value. We have carefully gone through the whole Act more than once, and on an examination of all its provisions the conclusion to which we come is that a natural stream, though its flow of water be in part derived by percolation from a canal, is not a canal until the Governor in Council has applied to it the provisions of section 5.

We now have to consider whether this *nālā* is a stream. A stream of water is water which runs in a defined course (*Taylor v. St. Helens Corporation, supra*), nor is a perennial flow a necessary condition to the legal conception of a stream provided the source, though irregular, be one of constant recurrence, and not merely fortuitous or temporary.

On the facts therefore we are of opinion that this *nālā* is a stream, as that word is legally understood; it is clear that before the existence of the canal and any accession to its stream by percolation from the canal, for about half the year the *nālā* was a running stream, deriving its flow of water from sources which though not perennial were constant in their recurrence.

It may be, as the Commissioners say, that the more important of its sources now is the canal but none the less is it a natural stream; and it may be too that the defendant is, under section 48, liable to the rate thereby prescribed, but we are now concerned with the canal authorities' claim to stop the supply to the defendant under clause (c) of section 28 of the Act. The rule of law apart from the Act we take to be, that as the defendant has the right to the natural stream as incident to his holding Survey

No. 13, he has a right to all the water which actually forms part of that stream as soon as it becomes part, whether such water comes by ordinary natural means, as from springs or from the surface of the adjacent hills, or from rains, or is added by percolation from the artificial channel of the canal: and if the canal water has by percolation augmented the stream and became part of it, no distinction can be made between the original natural stream and the accession to it (*Wood v. Waud*⁽¹⁾).

Whatever rights the Act may give, it certainly does not entitle the canal authorities, as things now stand, to stop the flow to the defendant of the natural stream.

Though the prayer in the plaint is expressed in the widest terms, the real object (as we have already indicated) is to obtain an affirmation of the claim advanced by the canal authorities to stop under clause (c) of section 28 the supply of water to the defendant (who claims the same by virtue of his riparian rights arising out of his interest in Survey No. 13) in order to supply the legitimate demands of those entitled to receive water for their lands.

This claim is (in our opinion) misconceived and the decree must therefore be confirmed with costs.

Decree confirmed.

(1) (1849) 3 Ex. 748.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

BAI KASHI (ORIGINAL OPPONENT), APPELLANT, v. PARBHU KEVAL (ORIGINAL APPLICANT), RESPONDENT.*

Succession Certificate Act (VII of 1889)—Enquiry under the Act—Debts, existence of—Payment of money due into Court—Certificate in respect of the money so paid—Practice.

The Succession Certificate Act (VII of 1889) is intended for the protection of debtors, but this only means that where a debtor of a deceased person either

* First Appeal No. 51 of 1903 from order.

1303.

SECRETARY
OF STATE
v.
BALYANT
GANESH.

1903.

August 20.

1903.

BAI KASHI
v.
PARBHU
KEVAL.

voluntarily pays his debt to a person holding a certificate under the Act or is compelled by the decree of a Court to pay it to that person, he is lawfully discharged. There is nothing in the Act which either expressly or by necessary implication requires the Court granting a certificate to hold an enquiry into the existence of any debt alleged by the person applying to be due as a preliminary condition of the grant. The Court has merely to ascertain the representative title of the applicant for the certificate and not the existence or non-existence of the debt.

The fact that the amount of the debt to recover which a certificate is applied for is paid into Court does not extinguish the debt or affect the necessity of taking out the certificate under the Succession Certificate Act (VII of 1889).

APPEAL from an order passed by H. L. Hervey, District Judge of Surat, under the Succession Certificate Act (VII of 1889).

One Jivan Vardhman died on the 26th April, 1902, leaving behind him a son, Vajeram, and Bai Kashi, daughter of a predeceased son.

On the 5th June, 1902, Bai Kashi filed suit No. 106 of 1902 against one Husenbhai Ahmedbhai to recover from him Rs. 1,500, which she alleged were due to her. Husenbhai paid the money into Court.

On the 30th August, 1902, Vajeram obtained a certificate, under the Succession Certificate Act (VII of 1889), to collect Rs. 1,500, which he alleged were due to his father by the said Husenbhai Ahmedbhai, but before he could collect the amount he died.

Parbhu Kewal, the nephew of Jivan Vardhman, then applied, on the 24th September, 1902, for a certificate to collect the Rs. 1,500 from Husenbhai, which formed the subject of litigation in suit 106 of 1902, and which were already paid by the debtor into Court. This application was opposed by Bai Kashi on the ground that the debt of Rs. 1,500, which the applicant sought to recover, was not due to the estate of Jivan Vardhman but to Bai Kashi herself.

On the 30th December, 1902, the District Judge granted a certificate under the Succession Certificate Act (VII of 1889) to the applicant on the ground that under Hindu Law he was the nearest heir to his uncle Jivan Vardhman.

The opponent, Bai Kashi, appealed to the High Court.

M. N. Mehta for the appellant:—A regular suit (No. 106 of 1902) is already pending, in which the conflicting claims of the

deceased and the appellant will be decided. Till then the lower Court ought to have stayed its hands. It ought at least to have taken *prima facie* evidence as to the existence of the debt.

The debtor having paid the money into Court in that suit, there is no debt now existing in respect of which the certificate could be granted. If the certificate is granted, the debtor will be harassed with another suit.

Manubhai Nanabhai for the respondent:—The appellant has no *locus standi*. She does not herself claim the certificate. Her claim is adverse to the deceased himself and cannot be affected by these proceedings. The regular suit has nothing to do with this case. The debt is not extinguished by the deposit, and the certificate will be ultimately necessary.

If the certificate is now cancelled, the deceased would not be represented in the regular suit, and the decision therein will not bind the estate. This will expose the debtor to another suit at the instance of the rightful representative.

No inquiry as to the existence of the debts is necessary or even permissible; otherwise the proceedings would be interminable and the result would be fruitless, as it will affect no one. The scope of the inquiry is defined by section 7 of the Succession Certificate Act (VII of 1889); and the only question to be decided is as to who, out of the several claimants, is the most proper representative.

This Court cannot order that certificate should be given to no one. The only jurisdiction in appeal under section 19 of the Act is to prefer the claim of one as against the other claimant. Here there is only one claimant, and so this Court cannot cancel the present certificate.

CHANDAVARKAR, J.:—In my opinion there is no substance in either of the grounds which have been urged by Mr. Markand Mehta in support of this appeal.

There is no dispute as to the facts so far as they are necessary for the decision. One Jivan Vardhman died on the 26th April, 1902, leaving a son, Vajeram, and Bai Kashi, daughter of a predeceased son. Vajeram obtained a certificate under the Succession Certificate Act to enable him to collect the debts due to his deceased father, but before he could collect them he died. The

1903.

BAI KASHI

v.

PAREHU

KEVAL.

1903.

BAI KASHI

v.
PARBHU
KRYAL.

respondent in this appeal having thereupon applied to the District Court for a certificate under the Succession Certificate Act to enable him to realise a debt of Rs. 1,500 due to the deceased Jivan's estate from one Husenbhai Ahmadbhai, that Court has granted it holding that the respondent is, under the Hindu Law, the nearest heir to the deceased Jivan Vardhman, but the grant is objected to before us on two grounds.

In the first place it is urged that the District Court ought not to have granted the certificate without going into the question and deciding whether the debt of Rs. 1,500 said to be due from Husenbhai is a debt due to the estate of the deceased. I know of no law or authority which requires a Court to find whether the debts alleged to be due to the estate of a deceased person are really due or not as a preliminary condition of the grant of a certificate under the Succession Certificate Act. That Act is indeed intended for the protection of debtors, but that only means that where a debtor of a deceased person either voluntarily pays his debt to a person holding a certificate under the Act or is compelled by the decree of a Court to pay it to that person, he is lawfully discharged. There is nothing in the Act which either expressly or by necessary implication requires the Court granting a certificate to hold an enquiry into the existence of any debt alleged by the person applying to be due as a preliminary condition of the grant. Such an enquiry might make a proceeding under the Act something in the nature of a roving commission, whereas all enquiry under the Act is intended by the Legislature to be summary, as held in *Gulabchand v. Moti*⁽¹⁾. All that a Court has to do under the Act is to ascertain the right of a person to a certificate apart from the question of the existence or non-existence of the debts in respect of which he applies: see section 7, clause (2), of the Act. Supposing the Court does hold an enquiry into the existence of the debts and comes to a conclusion one way or the other as to any specific debt, what is the use of such an enquiry and finding? How does the Court's finding protect the debtor at all? In spite of it he may still refuse to pay contending that there is no debt and the holder of the certificate must in that case sue him and prove the existence of the debt.

(1) (1900) 25 Bom. 523.

1902.

BAI KASHI
v.
PARBHU
KEVAL.

In this particular case the debt is alleged by Bai Kashi (the appellant) to be due to her and not to the deceased Jiwan Vardhman, and it was urged that it was on that account necessary for the District Court to decide the question to whom the debt was due for the debtor's protection before granting the certificate. The appellant's objection, not being one to the right of the respondent to claim a certificate as the heir of the deceased, cannot be entertained in this proceeding. But how, again, would a decision by the Court on that question help or protect the debtor? If on the strength of the Court's finding that the debt was due to the deceased and not to Bai Kashi he pays the money to the holder of the certificate, it would be competent to Bai Kashi to sue him and prove that the debt was due to her; and if she proved that, the debtor's defence that he had paid it to the certificate-holder could not protect him, because the protection afforded by the Act is in respect of debts which are due to the estate of the deceased and not those due to third parties.

The second ground urged is that there is no debt in respect of which a certificate could be granted because the debtor has already produced Rs. 1,500 in Court in a suit which is said to be pending and to which, it is alleged, the debtor himself is a party. But the mere fact that a debtor produces money in Court cannot extinguish the debt. A decree in the suit holding that the debt is due to the estate of the deceased Jiwan cannot be a protection to the debtor, for any other person claiming to be the heir of the deceased may still sue the debtor. Hence it is that for the protection of debtors the Legislature has stepped in and provided that it is only a certificate under the Succession Certificate Act that can absolve the debtor from liability. After he has paid it to the holder of a certificate the question becomes one purely between such holder and any other person claiming to be the rightful heir of the deceased.

I would confirm the order. Cross-objections overruled. No order as to costs.

ASTON, J.—Parbhu Keval, respondent, applied to the District Court, Surat, for a succession certificate under Act VII of 1889 claiming to be the nearest heir to his deceased uncle Jivandas Vardhman. The only debt specified in the application alleged to

1303.

Bai KASHI
v.
PARBHU
KEVAL.

be due to Jivandas Vardhman is a debt of Rs. 1,500 alleged to be due by one Husanbhai Ahmedbhai.

The application was opposed by Bai Kashi on the ground that she claimed the debt in question to be due to herself and not to the estate of Jivandas Vardhman. It appears that Bai Kashi had already instituted a regular Suit No. 106 of 1902 against Parbhu Keval, present respondent, and against Husanbhai Ahmedbhai aforesaid.

In that suit she claimed to recover from the latter this very debt of Rs. 1,500 as a debt she alleged to be due to herself from the said Husanbhai. The latter pleaded that the debt was due by him to either the plaintiff Bai Kashi or to Parbhu Keval, the 1st defendant in Kashi's suit, and he paid the Rs. 1,500 into Court for payment to Bai Kashi or to Parbhu Keval as the Court might decide.

The question whether this very debt is due to the estate of Jivandas Vardhman or to Bai Kashi in her own right was thus a matter pending adjudication in a regular suit to which Bai Kashi and Parbhu Keval, the applicant and opponent in the succession certificate proceedings, are parties. It was contended before us that under these circumstances the District Judge would have exercised a sounder discretion if, in the present proceedings in which Parbhu Keval asked for a succession certificate to Jivandas Vardhman, he had at least recorded *prima facie* evidence that this debt is due to the estate of Jivandas, or else had postponed the issue of the certificate till the Suit No. 106 of 1902 is decided. These contentions were pressed because Mr. Manubhai for the respondent Parbhu Keval stated at the hearing that his client intended to sue for the alleged debt in question even if it be decided in regular Suit 106 of 1902 that the debt is due to Bai Kashi and not to the estate of Jivandas Vardhman, deceased, because, as Mr. Manubhai put it, Bai Kashi is suing in her own right in Suit 106 of 1902 and not as representative of Jivandas Vardhman. I do not follow the reasoning of Mr. Manubhai, but I think that the answer to the contentions of Mr. Mehta for the appellant Bai Kashi is that in proceedings under Act VII of 1889 the Court is concerned with the question whether the applicant proves his representative title and not with the

question whether the debts alleged to be due are due to the deceased person whom the applicant claims to represent.

The respondent has established his representative title and a succession certificate may quite possibly be put to a legitimate use by him even in the Suit 106 of 1902 if it be decided in that regular suit that Bai Kashi, plaintiff in that regular suit, is not entitled to the debt of Rs. 1,500 which present respondent claims to be a debt due to Jiwandas Vardhman, deceased.

If the respondent should seek to make use of the certificate in order to harass Bai Kashi with unnecessary litigation, that could be a matter for the consideration of any Court in which further litigation about this particular claim to the Rs. 1,500 might be undertaken, but this argument cannot be entertained as a reason for refusing the certificate when respondent has established his representative title. The issue of the certificate in no way affects the question whether the debt of Rs. 1,500 alleged in the application to be due to the estate of Jiwandas is or is not due to that estate.

I would therefore confirm the order of the lower Court and dismiss this appeal. The cross-objection is overruled. No order as to costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Jacob.

PANDURANG BALAJI BAGAVE (ORIGINAL PLAINTIFF), APPELLANT, *v.*
KRISHNAJI GOVIND PARAB AND ANOTHER (ORIGINAL DEFENDANTS),
RESPONDENTS.*

1903.

August 25.

Civil Procedure Code (Act XIV of 1882), section 266 (c)—House—Sale in execution—Exemption from liability to attachment or sale—Facts to be taken to exist which are proved.

A certain house was sold in execution of a decree. Subsequently the purchaser having brought a suit to recover possession of the house, the defendant, that is, the judgment-debtor under the decree, contended that

* Appeal No. 8 of 1903 from order.

1903.

PANDURANG
BALAJI
v.
KRISHNAJI
GOVIND.

inasmuch as he was an agriculturist and the house was occupied by him, the materials of it could not be sold having regard to clause (c) of section 266, Civil Procedure Code (Act XIV of 1882).

Held, that the judgment-debtor having never suggested, much less proved, in the execution proceedings that clause (c) of section 266 of the Civil Procedure Code (Act XIV of 1882) had application to the case, the house was liable to be attached and sold and it was not open to him to contend that the Court had no jurisdiction to order the sale of the house by reason of clause (c). Only those facts can be taken to exist which are proved. In the absence of proof the exemption from liability to attachment or sale does not exist for the purposes of execution proceedings. "Strangers to a suit are justified in believing that the Court has done that which by the direction of the Code it ought to do."

Malkarjun v. Narhari⁽¹⁾ applied, *Gurupadapa v. Irapa*⁽²⁾ and *Vasanji Haribhai v. Lallu Akhu*⁽³⁾ distinguished.

APPEAL against a remand order passed by Mahadev Shridhar, First Class Subordinate Judge of Ratnágiri with appellate powers, reversing the decree of M. M. Bhat, Joint Subordinate Judge.

The plaintiff purchased at a sale in execution of a decree the western moiety of the house in dispute and he was put in joint possession of the house with the person entitled to the other moiety. Subsequently the judgment-debtor having caused obstruction to the plaintiff's management, he brought the present suit either for the recovery of possession of the moiety purchased by him or for partition.

Defendant 1, the judgment-debtor under the decree, contended that as he was an agriculturist, his house could not be attached in the execution of the decree and that the sale being illegal, the plaintiff got no title to the house by his purchase.

Defendant 2, the owner of the other moiety, answered that he had no objection to the house being partitioned at the instance of the plaintiff if his moiety was not thereby affected.

The Subordinate Judge found that the sale to plaintiff was not illegal and that he was entitled to a partition and separate possession of the moiety of the house. He therefore decreed that by equitable partition the plaintiff should recover possession of the moiety belonging to defendant 1.

(1) (1900) 25 Bom. 337 at p. 347.

(2) (1890) 14 Bom. 558.

(3) (1885) 9 Bom. 285.

On appeal by defendant 1 the Judge reversed the decree and remanded the suit for trial after raising proper issues. The reason for the remand was as follows:—

The Subordinate Judge remarks: "In the execution proceedings no objection was taken by the defendant under section 266. That was the only time when such objection should have been taken under section 244. It cannot be taken in this suit." Now section 244 bars a suit in respect of questions arising between parties to the suit in which the decree was passed, or their representatives and relating to the execution, discharge or satisfaction of the decree. It has been held in *Vishvanath v. Subraya* (I. L. R. XVI Bom. 290) that a purchaser at a Court's sale is not a party or the representative of a party within the meaning of section 244 of the Civil Procedure Code.

Section 244 does not therefore preclude the defendant from raising the question. It is open to the plaintiff to contend that the defendant is estopped from questioning the sale. If this question of estoppel by conduct or otherwise is raised by the plaintiff, proper issues must be framed and the question decided according to law.

The plaintiff appealed.

H. C. Coyajee for the appellant (plaintiff):—The order of remand was passed under section 562 of the Civil Procedure Code. We contend that the said order is not correct, and the decision arrived at by the first Court was right. Sections 244 and 266 of the Civil Procedure Code relate to execution of decrees; therefore, any question as to the legality or propriety of the execution sale should have been raised while the proceedings in execution were pending. If the sale was illegal the defendant should have appealed under section 244. It is not now open to him in the present suit to contest the legality of the sale.

Further, the question as to the illegality of the sale on the ground of section 266 (c) was not only not raised in the execution proceedings but there was no evidence offered by the defendant to prove that he was an agriculturist entitled to the benefit of clause (c) of section 266 of the Civil Procedure Code. We bought the moiety of the house under the belief that the Court executing the decree was empowered to sell it. Under these circumstances the judgment-debtor cannot impeach the sale: *Seth Chand Mal v. Durga Dei*⁽¹⁾.

1903.

PANDURANG
BALAJI
v.
KRISHNAJI
GOVIND.

1903.

PANDURANG
BALAJI
v.
KRISHNAJI
GOVIND.

Narayan V. Gokhale for the respondent (defendant) :—He referred to *Gurupadapa v. Irapa*⁽¹⁾ and *Vasanji v. Lallu Akhu*⁽²⁾.
(*Jenkins, C. J.* referred to *Malkarjun v. Narhari*⁽³⁾).

JENKINS, C. J. :—The plaintiff sues to recover possession of the western moiety of a house, alleging that he purchased that moiety at an auction sale in execution of a decree.

The defendant 1 pleads that inasmuch as he is an agriculturist and the house was occupied by him, the materials of it cannot be sold, having regard to clause (c) of section 266, Civil Procedure Code.

The first Court decided in the plaintiff's favour and against the plea, but on appeal the 1st Class Subordinate Judge, A. P., reversed the decision and remanded the suit for trial after raising proper issues. From that order this appeal is preferred.

Now the house, apart from clause (c) of section 266, clearly could be attached and sold in execution of the decree, and it was only if it were shown that it fell within clause (c) that it could not be attached and sold. But admittedly the judgment-debtor never suggested, much less proved, that clause (c) had any application to the case.

It is a general rule that in Courts of Law only those facts can be taken to exist which are proved; so that it is manifest that in the absence of proof the exemption from liability to attachment or sale did not exist for the purposes of the execution proceedings. Therefore the executing Court had complete jurisdiction to make the order it did; and I do not think that it is now open to the judgment-debtor in the former suit, who is the defendant in the present suit, to contend that there was no jurisdiction to order the sale of the house by reason of clause (c).

This case appears to me to be distinct from *Gurupadapa v. Irapa*⁽¹⁾, and also from *Vasanji Haribhai v. Lallu Akhu*⁽²⁾, on which it proceeded.

I think that to come to any other conclusion than that which we have expressed would be to disregard what has been laid

(1) (1899) 14 Bom. 558.

(2) (1885) 9 Bom. 285.

(3) (1900) 25 Bom. 337.

down by the Privy Council in the recent case of *Malkarjun v. Narhari* ⁽¹⁾, where it was said that "strangers to a suit are justified in believing that the Court has done that which by the direction of the Code it ought to do." Here I think the purchaser, who was a stranger to the suit, was justified in believing that the Court had authority to attach and sell this property.

For these reasons I think that the order of the lower appellate Court was wrong and that it must be reversed and the decree of the Subordinate Judge restored with costs throughout.

Decree reversed.

(1) (1900) 25 Bom. 337 at p. 347.

1903.

PANDURANG
BALAJI
P.
KRISHNAJI
GOVIND.

CRIMINAL APPELLATE.

*Before Mr. Justice Chandavarkar and Mr. Justice Jacob; on reference,
before Mr. Justice Aston.*

EMPEROR v. ALLOOMIYA HUSAN.*

Gambling—Bombay Prevention of Gambling Act (Bombay Act IV of 1887), sections 4, 5, 6, 7—Keeping a common gaming house—Applicability of presumption under section 7 to cases under section 4—Warrant under section 6—Delay in executing the warrant—Previous conviction—Criminal Procedure Code (Act V of 1898), section 342—Evidence Act (Act I of 1872), sections 11, 54.

1903.
August, 25

On the 19th May, 1903, a warrant was issued by the Commissioner of Police at Bombay, under section 6 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887), for the arrest of accused 1. In execution of this warrant, when, on the 7th June, 1903, the police entered the room of accused 1, no actual play was seen by the raiding party, but there were found playing cards on the ground, and ten persons, including accused 1, were found sitting in a circle. Upon these facts the Magistrate convicted the accused of keeping a common gaming house, an offence under section 4 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887), by applying to him the presumption created by section 7 of the Act; and taking into consideration the previous convictions of the accused under the Act, he sentenced him to pay a fine of Rs. 500, the maximum amount of fine allowed by the section. On appeal to the High Court,

Held, by Chandavarkar and Aston, JJ. (Jacob, J., dissenting), affirming the conviction, (1) that the presumption created by section 7 of the Bombay

1903.

EMPEROR
v.ALLOOMIYA
HUSAN.

Prevention of Gambling Act (Bombay Act IV of 1887) could be applied to cases falling under section 5 as well as to those falling within the purview of section 4 of the Act.

(2) That the applicability of section 7 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) was affected by the fact that a considerable interval had elapsed between the issue of a warrant under section 6 of the Act and the execution thereof.

(3) That the evidence that the accused had been previously convicted of the same offence was admissible to show guilty knowledge or intention.

Held, by Jacob, J., dissenting, (1) that the presumption created by section 7 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) is sufficient for the purposes of section 5 of the Act. It is also sufficient for the purposes of section 4 (a) so far as regards the fact that the house, &c., is so used, but it is not alone sufficient for the purpose of showing that the house was so kept or used by any specified person.

(2) That in a trial for an offence under section 4 (a) of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887), the evidence that the accused was previously convicted of a similar offence cannot be admitted either under sections 14, 15 or 54 of the Evidence Act (I of 1872).

(3) That the question whether the delay, between the issue of a warrant under section 6 of the Act and its execution, has been reasonable or otherwise is one which must be decided with reference to the circumstances of each case.

APPEAL from the conviction and sentence recorded by Karsandas Chhabildas, Third Presidency Magistrate of Bombay.

On the 19th May, 1903, the Commissioner of Police at Bombay issued, under section 6 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887), a warrant for the arrest of Alloomiya Husan, accused 1.

In execution of this warrant, the police entered the room of accused 1 on the 7th June, 1903, where a pack of cards was found and ten persons, including accused 1, were found seated in a circle.

The accused 1 was thereupon charged under section 4 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) with keeping a common gaming house, and accused 2—10 under section 5 of the Act with being found gaming therein with cards and money.

The Magistrate convicted them and sentenced them to pay fines varying in amount. The following is a material portion of his judgment.

1883.

EMPEROR
v.
ALLOOMIYA
HUSAN.

Three witnesses have been examined by prosecution, *viz.*, Inspector Peter Sullivan, Sub-Inspector Roberts and Sub-Inspector Finch. After going through their evidence I am fully convinced that the statements of all the accused except No. 9 are unworthy of any belief whatever and that all the accused, except No. 9, were actually gaming with cards and money when they entered No. 1's room armed with a warrant from the Commissioner of Police on the 7th instant at 3 P.M. It is proved to my satisfaction that when they entered the room, all the accused except No. 9 were actually playing with cards and money as they were seated in a circle; that on seeing Inspector Sullivan entering there was a general confusion and rush for windows and doors; that accused No. 10 threw out of the window a cap which was lying on the ground; that No. 8 jumped on a chair and began to read the Kurán, while No. 7 quietly sat near him and that No. 9 began to work in a bath room. The evidence of Inspector Sullivan is fully borne out by the evidence of Sub-Inspectors Roberts and Finch, from whose evidence it is also proved that the packs of cards, Exhibits B and C, were found in No. 1's room—Exhibit B on the floor scattered about and Exhibit C underneath a mat—and that Rs. 1-3-0 were found lying on the ground. It is also proved that Sub-Inspector Finch and Roberts had to go to the door on the other side in order to prevent the accused escaping. One witness has been examined on behalf of the accused by name Abdul Rehman Abdul Rasool, a relation of accused No. 1. He was not present at the time accused were arrested, but he tries to support the statements of accused Nos. 1—4 and 5 and 8 showing that No. 8 is a preacher of Kurán, that No. 1 was never seen gambling, and that some money was due to Nos. 4 and 5. In view of the evidence for the prosecution which is quite clear and trustworthy, and which I do not see any reason to disbelieve, I am not prepared to hold on the evidence of this witness alone, who is related to No. 1 closely, that Nos. 4 and 5 and 8 were in No. 1's room for the innocent purposes they suggest and that the three witnesses for the prosecution have perjured themselves. I do not believe his evidence at all and on the evidence for the prosecution find that accused No. 1, being the occupier of the room, used it for the purpose of a common gaming house, and that Nos. 2, 3, 4, 5, 6, 7, 8 and 10 were found gaming with cards and money in that room. I accordingly convict accused No. 1 under section 4 of Act IV of 1887 and accused Nos. 2, 3, 4, 5, 6, 7, 8 and 10 under section 5 of the said Act. With regard to accused No. 9, I am inclined to believe that he was a mere looker on temporarily. For the evidence shows that his tools were with him and that he began to work after the Police came. It is doubtful whether he was in No. 1's room purely for the purpose of gaming. I therefore give him the benefit of the doubt and order him to be acquitted. Now with regard to the suggestion made by Mr. Kazi Kabirudin that the warrant issued by the Commissioner of Police is bad, I must hold that the warrant is perfectly legal. It has been executed by an officer to whom it was addressed and has been issued by the Commissioner of Police who is authorized, under section 6 of the Gambling Act, to issue it. I fail to see any

1903.

EMPEROR
v.
ALLOOMYA
HUSAN.

illegality in it. With regard to the point that there is no evidence to show that accused No. 1 used this room as a common gaming house, as there is nothing to show that the room was used for the profit of the person occupying or using such room, I think section 7 of the Gaming Act is quite clear. Section 7 says when cards, dice, counters or other instruments of gaming used in playing any game, &c., are found in a house or room entered under warrant issued under section 6, it shall be evidence, until the contrary is shown, that such house or room is used as a common gaming house and that the persons found therein were present for the purpose of gaming, although no play was seen by the Police officer. In this case it is proved that a legal warrant was issued under section 6 by the Commissioner of Police. It is also proved that cards and money were found in a room which is proved to be in No. 1's occupation and which was entered under the authority of that warrant. These two circumstances are, in my opinion, evidence under section 7 of that room being used as a common gaming house and that the persons present therein were there for the purpose of gaming until the contrary is made to appear. As it has not been made to appear to my satisfaction that the accused were in that room for the innocent purposes mentioned by them and as cards and money were found in that room, I must convict accused No. 1 under section 4 and accused Nos. 2, 3, 4, 5, 6, 7, 8 and 10 under section 5 of the Gaming Act. With regard to the punishment to be inflicted on the accused, I think No. 1 deserves to be dealt with severely as he is admittedly a confirmed gambler. He has been convicted twice under section 4 on a charge of keeping a common gaming house and thrice under section 5 on a charge of gaming. In his case a deterrent sentence is necessary. I sentence accused No. 1 to pay a fine of rupees five hundred, in default three weeks' rigorous imprisonment. With regard to accused Nos. 2, 3, 4, 5, 6, 7, 8 and 10, I sentence each of them to pay a fine of rupees seventy-five each, in default one week's rigorous imprisonment.

The accused 1 appealed to the High Court.

The following are the sections of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887), referred to in the case:—

4. Whoever:

(a) being the owner or occupier or having the use of any house, room, or place, opens, keeps or uses the same for the purpose of a common gaming house;

(b) being the owner or occupier of any such house, room or place, knowingly or wilfully permits the same to be opened, occupied, kept or used by any other person for the purpose aforesaid;

(c) has the care or management of, or in any manner assists in conducting the business of any such house, room or place opened, occupied, kept or used for the purpose aforesaid

(d) advances or furnishes money for the purpose of gaming with persons frequenting any such house, room, or place, shall be punished with fine which may extend to five hundred rupees, or with imprisonment which may extend to three months.

5. Whoever is found in any common gaming house, playing or gaming with cards, dice, counters or other instruments of gaming, or is found there present for the purpose of gaming, whether by playing for any money, wager, stake or otherwise shall be punished with fine which may extend to two hundred rupees, or with imprisonment which may extend to one month.

Any person found in any common gaming house during any gaming or playing therein, shall be presumed, until the contrary be made to appear, to have been there for the purpose of gaming.

6. It shall be lawful for the Commissioner of Police in the City of Bombay, and elsewhere for any Magistrate of the First Class or any District Superintendent of Police or for any Assistant Superintendent empowered by Government in this behalf, upon any complaint made before him on oath that there is reason to suspect any house, room, or place to be used as a common gaming house, and upon satisfying himself after such enquiry as he may think necessary that there are good grounds for such suspicion to give authority, by special warrant under his hand, when in his discretion he shall think fit, to any Inspector, or other superior officer of Police of not less rank than a Chief Constable—

(a) to enter, with the assistance of such persons as may be found necessary, by night or by day, and by force, if necessary, any such house, room, or place; and

(b) to take into custody and bring before a Magistrate all persons whom he finds therein, whether they are then actually gaming or not; and

(c) to seize all instruments of gaming, and all moneys and securities for money, and articles of value reasonably suspected to have been used or intended to be used for the purpose of gaming, which are found therein; and

(d) to search all parts of the house, room or place, which he shall have so entered, when he shall have reason to believe, that any instruments of gaming are concealed therein, and also the persons of those whom he shall so find therein or take into custody, and to seize and take possession of all instruments of gaming found upon such search.

7. When any cards, dice, gaming table, counters, cloth, board or other instruments of gaming used in playing any game, not being a game of mere skill, are found in any house, room, or place entered under warrant issued under the provisions of the last preceding section or about the person of any of those who are found therein, it shall be evidence, until the contrary is made to appear, that such house, room, or place is used as

1903.

EMPEROR
C.ALLOOMIYA
HUSAN.Gaming in common gaming
house.Power to authorize entry of
gaming house by Police of-
ficers and seizure of gaming
instruments.Proof of keeping, or of
gaming, in common gaming-
house.

1933.
EMPEROR
v.
ALLOOMIYA
HUSAN.

a common gaming house, and that the persons found therein were there present for the purpose of gaming, although no play was actually seen by the Magistrate or Police officer, or by any person acting under the authority of either of them.

S. B. Dady Barjor for the accused 1.

Scott (Advocate General), with the Public Prosecutor, for the Crown.

CHANDAVARKAR, J.:—The appellant, Alloomiya Husan, has been convicted by the Third Presidency Magistrate, Bombay, of the offence of keeping a common gaming house under section 4 of Bombay Act IV of 1887. Three grounds have been urged before us in support of this appeal against the conviction. The first is that the presumption of guilt created by section 7 of the Act has been wrongly applied to the offence of keeping a common gaming house under section 4. It is contended that that presumption applies and was intended by the Legislature to apply only in the case of the offence of gaming in a common gaming house, which is dealt with in section 5 of the Act. There is nothing in the language of section 7 which lends support to the narrow construction which we are asked to put upon it. On the other hand, the language is wide enough to cover the case of an offence of keeping or using a common gaming house.

The second ground of appeal urged before us is that the learned Presidency Magistrate admitted the evidence of certain previous convictions against the appellant in proof of the offence of which he has been convicted. That evidence is to the effect that the appellant was previously convicted twice under section 4 of Bombay Act IV of 1887 and thrice under section 5 of the Act. The learned Magistrate has drawn from this evidence the inference that the appellant is a "confirmed gambler" and that he, therefore, "deserves to be dealt with severely." If the object of proving the previous convictions was merely for the purposes of the punishment to be awarded after conviction, the Magistrate ought not to have allowed that evidence to go in before convicting the appellant; but even in that case there is no law which provides that proof of previous convictions can be given to justify enhanced punishment under Bombay Act IV of 1887. Section 75 of the Indian Penal Code, which deals with the punishment of

1903.

EMPEROR

ALLOOMITA
HUSAN.

persons convicted after a previous conviction, is confined to offences punishable under Chapter XII or XVII of that Code. Nor could the proof of previous convictions be given against the appellant to show that he bore a bad character. Section 54 of the Evidence Act prohibits the admission of such evidence unless evidence has been given that the accused person has a good character, and the only exception allowed to that is where the bad character of the person is itself a fact in issue or relevant. The learned Advocate General has sought to bring the admission of the evidence in question within that exception by contending that, as the question at issue in this case was whether the appellant kept a common gaming house, the evidence was admissible under either section 14 or 15 of the Evidence Act. Now, however the law stood before the amendment of the Evidence Act in 1891, such evidence is made clearly admissible by the amendment of the Act. See Explanation 2 to section 14 of the Evidence Act. According to it, previous convictions become relevant within the meaning of that section when the existence of any state of mind, or body, or bodily feeling, is in issue or relevant. For instance, where a person was charged with the offence of belonging to a gang of persons associated for the purpose of *habitually* committing dacoity, it was held by the Calcutta High Court that proof of previous conviction was admissible under section 14 of the Evidence Act, having regard to the character of the offence attributed to the accused: *Empress v. Naba Kumar Patnaik*.⁽¹⁾ In the present case, the offence charged against the appellant was one of keeping a common gaming house. Both in the charge-sheet and in the Magistrate's judgment it is stated generally that he was accused of the offence of keeping a common gaming house under section 4 of the Act. That section divides the offence into four classes, and all are described in the marginal note as "keeping a common gaming house." The first class has reference to the owner or occupier of a house, room, or place, who uses or keeps it as a common gaming house. Now, the user of a place or the keeping of it for a particular purpose necessarily connotes the existence of a state of mind. They imply a purpose showing intention and knowledge, intention to use the place for that

(1) (1897) 1 C. W. N. 148.

1903.

EMPEROR
v.
ALLOOMIYA
HUSAN.

purpose and knowledge that it is so used. To keep a common gaming house is to hold the house and manage it with the intention of using it as such *habitually*. In the words of Lord Hobhouse in *Powell v. Kempton Park Race-course Company*,⁽¹⁾ "the phrase *use for a purpose* necessarily implies a deliberate use, a designed choice of the thing used for the purpose in hand." "Kept" and "used," he says, are expressions necessarily or very strongly importing an habitual or repeated use of the thing for the purpose. So also in the second class of the offence. According to it, a person commits the offence of keeping a common gaming house, if, being the owner or occupier of it, he *knowingly or wilfully* permits the same to be opened, occupied, kept, or used by any other person as aforesaid; or, in the third class, if he advances or furnishes money *for the purpose* of gaming with persons frequenting any such house. These are ingredients of the offence which render it necessary to give proof of his *knowledge* or intention and habitual course of dealing with the house, room, or place so far as they are relevant to the proof of the offence. I think, therefore, that, having regard to the character of the offence charged against the appellant *in respect to this particular room*, the evidence was rightly admitted under section 14 of the Evidence Act.

The appellant was convicted by the Magistrate generally under section 4, and the evidence in the case shows that there was gambling going on when the Police entered, and the appellant who was the occupier of the room was one of the gamblers. This evidence, with the evidence of previous convictions, consisting in his own admissions, shows that he used and kept it as a common gaming house both under the first and the second class of the offences in section 4, *i. e.* (a) and (b).

The third and last ground of appeal is that the execution of the warrant which was issued by the Commissioner of Police under section 6 of Bombay Act IV of 1887, and under which the Police entered the appellant's house and conducted a search, was illegal, because, it is contended, the warrant was executed not immediately after it had been issued, but several days after. The date of the warrant is 19th May, 1903, and it was executed on the

(1) (1899) A. C. 143 at p. 172.

7th June, 1903. Section 6 of the Act does not say that the warrant should be executed immediately after its issue, nor does it prescribe any period during which it must be taken to be in force. But the argument advanced by the appellant's pleader is that it could not have been the intention of the Legislature to keep a warrant of this kind in force for an indefinite period and authorise those to whom it is issued to let it lie in their pockets as long as they like and execute it after the lapse of considerable time. But when the Legislature has not prescribed any period limiting the time during which it is to be in force, the presumption is that it retains its validity until it is executed. In *Dickenson v. Brown and others*⁽¹⁾ Lord Kenyon said that the warrant of a Magistrate was not returnable at any particular time, but continued in force until it was fully executed and obeyed, though it were seven years. In *Mayhew v. Parker*⁽²⁾ the same learned Judge held that a warrant to arrest a person that he might be bound to appear at the next Session of *Oyer and Terminer* might be executed at any time. Some discretion must be given to the officer executing a warrant, and whether that discretion is exercised properly and within a reasonable time or not is a question which must depend on the circumstances of each case. But the warrant itself does not become illegal merely because it is executed not immediately after its issue but some days after that. There may be, under certain circumstances, illegality attending the execution of the warrant and rendering the officer executing it liable on account of such illegal execution; and yet the warrant itself may be in force, no period of time being expressly prescribed for its execution. It was said that the language of section 6 of the Act showed that the warrant must be executed immediately after its issue, and the case was put before us in this way in support of that. The persons who occupied the place when the warrant was issued might leave and others might come and live there, and it cannot have been the intention of the Legislature that the warrant should be executed when there has been a change of that kind. But it appears to me that the language of section 6 supports the view that the Legislature did not intend to restrict the authority executing the warrant to any limit of time. The warrant has to

1903.

EMPEROR
 ८.
 ALLOOMIYA
 HUSAN.

(1) (1794) 1 Peck. N. P. 307.

(2) (1793) 8 T. R. 110.

1993.

EMPEROR

v.

ALLOOMIYA

HUSAN.

be issued when a complaint is made on oath that there is reason to suspect that "any house, room, or place" is used as a common gaming house. The attack aimed at primarily is against a *particular locality* as distinguished from the persons who live in or frequent it. It is because a house, room, or place is suspected to be a rendezvous of gamblers that the Legislature has authorized the issue of a warrant, the object being to prevent any house becoming the resort of gamblers. The gamblers are reached through the house, room, or place, and it is the house, room, or place which is to be entered and searched. The complaint in fact on the basis of which the warrant goes is against the house, room, or place, and its inmates and its contents come in as parts of it. That being the nature of the complaint and the house, room, or place standing where it did, it may be the Legislature has not prescribed any limit of time for the execution of the warrant, but left it to the discretion of the officer issuing it. Persons who live in such a place may change from day to day or from hour to hour, as those who gamble there may change. But the house, room, or place being in itself *prima facie* proved to the satisfaction of the authority issuing the warrant under section 6 of the Act to be a *common gaming house*, it continues to be so for the purposes of the Act and may be searched within a reasonable period so long as the warrant, not being executed, is in force. Again, the object being to apprehend the gamblers and seize the gaming instruments, it may be necessary sometimes that the executing officer should bide his time to make the search. Having regard to all these circumstances I think that the Legislature has deliberately omitted to provide for any period of time for the execution of the warrant.

The only flaw in the warrant urged before us was that because the search under it was made some days after its issue, we must decline to draw under section 7 the presumption against the appellant that the place was used as a common gaming house. For the reasons I have given neither the warrant nor the search under it is vitiated by the fact that the search was made several days after it had issued. But assuming that the flaw pointed out is of such a character as to vitiate the search and make the presumption created by section 7 inapplicable to the case, what

follows? This only that the prosecution must prove that the place searched by the Police was used as a common gaming house. It only makes a difference as to on whom the *onus* of proof in the first instance lies. Here the evidence of witnesses for the prosecution proves that gambling was going on when the Police entered and that packs of card and money were found in the room. The appellant and the other persons who were accused with him were caught almost red-handed. That evidence with the evidence of previous convictions against the appellant is sufficient, in my opinion, as it was sufficient in the opinion of the Magistrate who saw and heard the witnesses and examined the accused, to prove that the appellant's course of dealing with the room in which he has lived for the last 18 or 19 years has been to treat it as a house kept for gaming. The discrepancies pointed out in the evidence by the appellant's pleader are too trivial to affect the weight of it. I would, therefore, confirm the conviction and sentence under section 4 and reject this appeal.

JACOB, J.—I have had the advantage of perusing my learned colleague's judgment in this appeal, and it is with much regret that I feel myself unable to concur in some of the conclusions at which he has arrived, materially affecting the decision of the case.

The first objection taken for the appellant was that the *presumption* (I use this word for want of a better concise term, in accordance with common practice, though I am doubtful whether the term accurately connotes the conclusions of the section) created by section 7 of Bombay Act IV of 1887 was applicable only in connection with an offence alleged to fall under section 5, and not in connection with one under section 4 of the Act. It is, I think, obvious that broadly stated as this contention was, it is untenable. I am not sure, however, that the learned pleader, who appeared for the appellant, was quite successful in explaining clearly the point of his objection.

Now it is clear that section 7 does provide for a "presumption" under certain circumstances that the house, room or place in question is used as a common gaming house. That is sufficient for the purposes of section 5. It is also sufficient for the purposes of section 4 (a) so far as regards the fact that the house, &c., is so used, but it is not alone sufficient for the purpose of

1903.

EMPEROR
v.
ALLOOMIYA
HUSAN.

1903.

EMPEROR
v.
ALLCOMITA
HUSAN.

showing that the house was so kept or used by any specified person, and in certain cases this would be certainly an important distinction in favour of a person charged with an offence under section 4 (a).

It is necessary in order to comply with the provisions of section 6 of the Act that the authority issuing the warrant should be satisfied that there are good grounds for suspecting the house, &c., to be used as a common gaming house, that is (under section 3), that it is kept or used for the profit or gain of the owner or occupant, &c., and before he can be so satisfied, it would seem to be necessary *ex hypothesi* that he should have what he deems to be reliable information as to the enjoyment, or at least as to matters involving reason to suspect the enjoyment, of such profit or gain by some specified individual as such owner or occupant. In the present case the warrant which is on the record indicates that the house was kept by the appellant. I am of opinion that this circumstance alone would not have justified any presumption against the accused, if he had disputed the fact that he was the owner or occupant of the house. The burden of proving this fact, which it is necessary to prove for a conviction under section 4 of the Act, is not removed from the prosecution by the provisions of section 7 and the entry of his name in the warrant would so far be no evidence of this fact against the accused.

In the present case, however, this objection of fact was not taken before the Magistrate. As the record before us stands it is undisputed that the appellant was the occupant of the house, and to him, as such, the "presumption" that the house was used as a common gaming house attaches. I concur therefore in holding that on the facts of this case the first objection is untenable.

The second objection has reference to the admission, not indeed of evidence, but of statements elicited from the appellant as to previous convictions for offences under the same Act. I concur in the opinion (see *Yasin v. King Emperor* ⁽¹⁾) that the examination of an accused person in respect of such previous convictions which it may be necessary or permissible for the

(1) (1901) 28 Cal. 689.

prosecution to prove is without legal warrant or justification, having regard to the provisions of section 342 of the Criminal Procedure Code. For the purposes of the present argument, however, these statements must be regarded as evidence, and the question which arises is whether evidence of such previous convictions was relevant in the present case.

It is not necessary I think to consider in this case whether such evidence would have been admissible after conviction for the purpose of affecting the sentence to be passed. It seems probable on the construction of section 54 of the Evidence Act, especially in view of the circumstance that in the matter of civil suits a somewhat analogous condition of affairs is dealt with in section 55, that such evidence tendered even for such a limited purpose must be excluded. The question however is not free from doubt (see *Queen v. Shiboo Mundle*⁽¹⁾ and *Roshun Doosadh v. Empress*,⁽²⁾) and whether this is likely to have been the real intention of the Legislature in view of the deliberate adoption of the principle expressed in section 54 of the Evidence Act prior to its amendment by Act III of 1891, and the considerations which brought about that amendment (see *Queen-Empress v. Kartick Chunder Das*⁽³⁾) may well be questioned.

The provisions of section 221 of the Criminal Procedure Code have reference, it may be noted, to the competence not to the discretion of the Court in awarding punishment. However in this case a decision on this point is not at present called for as the learned Advocate General very readily admitted before us that the previous convictions must have weighed with the Magistrate in determining the question of the accused's guilt. Now as regards the admissibility of the evidence in this connection my learned colleague has applied section 14 of the Evidence Act. He regards for this purpose the case as falling possibly within the purview of section 4, clause (b) or clause (d), of the Act.

This in my opinion is going entirely beyond the record. It is true that so far as any law is quoted, the Magistrate only refers generally to section 4, which of course might include or denote clause (b) or clause (d) as well as clause (a), but the offence is clearly stated to have been that of "keeping a common gaming

1903.

EMPEROR
v.
ALLOOMIYA
HUSAN.

(1) (1865) 3 W. R. Cr. 38.

(2) (1880) 5 Cal. 768.

(3) (1887) 14 Cal. 721.

1903.

EMPEROR
v.
ABDOOMITA
HUSAN.

house," and this no less clearly falls under clause (a) and not under clause (b), much less under clause (d).

I can find nothing in the record and certainly nothing was said at the hearing before us to indicate that the offence was ever regarded as falling under clause (b) or clause (d).

It is indeed true that the general expression "keeping a common gaming house" is attached in the margin to the whole of section 4 of the Act. This seems to me however beside the present question, apart from the fact that marginal notes form no part of the legislative enactment: *Dukhi Mullah v. Halway*⁽¹⁾, *Punardeo Narain Singh v. Ram Sarup Roy*⁽²⁾. Section 242 of the Criminal Procedure Code requires that the particulars of the offence of which a person is accused shall be stated to him, and it is to my mind clear that a general reference to the inclusive terms of a marginal note appended to a section which deals with several offences made up of distinct facts, does not amount to a compliance with this requirement. The expression "keeping a common gaming house" applies in strict parlance only to the terms of clause (a), and looking to the record and to the case as presented to us, it seems to me impossible to conceive that any other offence than one falling under clause (a) was contemplated by the prosecution, or by the Magistrate, or by the accused.

In my opinion there can be no doubt that the two clauses (a) and (b), provide for perfectly distinct offences. The ingredient of the house being kept or used for profit or gain is common indeed to both, but in the case of clause (a) the direct recipient of the gain or profit is the owner or occupant himself, while under clause (b) it is some other person whom the owner or occupant has knowingly or wilfully permitted to use the house for such a purpose.

Clause (d) on the other hand deals with an entirely different state of facts. The advance of money by the appellant for such a purpose has never been alleged. Now even assuming that clause (b) could under any circumstances be applied by us in this appeal, there is no evidence or allegation that any such permission as is stipulated in this clause had been given by the appellant to any other person, or that any other person had used or kept the

(1) (1895) 23 Cal. 55.

(2) (1893) 25 Cal. 853.

house for his profit or gain. The necessary ingredient of fact, therefore, is wanting, and no question of knowledge of wilfulness, or indeed of any other state of mind, can, therefore, arise in connection therewith as affecting the appellant.

As stated above, however, I am clearly convinced that clause (b) is not applicable, and clause (a) read with the definition in section 3, which states the ingredients of the offence, is concerned solely with matter of fact, and not with any such states or conditions as are specified in section 14 of the Evidence Act.

Further, it seems clear that the relevance of such previous convictions would be excluded by the terms of explanation (1) of section 14 of the Evidence Act, read for instance with illustration (p) appended to the section.

Equally I am of opinion that section 15 of the Evidence Act is inapplicable. In connection with an offence under section 4 (a) there is no question, at any rate in the present case, of accident, or knowledge or intention. The words "*for the purpose of a common gaming house*" in this clause do not in my opinion involve any notion of intention, as distinguished from accident, but are used as introductory of the definition in section 3. The facts set out in that definition are what must be proved to establish the purpose.

The words of Lord Hobhouse quoted by my learned colleague from the case of *Powell v. Kempton Park Race-course Company*⁽¹⁾ do not appear to me to be in point. The expression was used in the course of a discussion bearing on the question how far the phrase "use for a purpose" is to be limited to the more proximate or direct object of the use. A presumption of deliberate choice or intention attaches more or less to nearly all criminal acts, but it would not therefore be held that intention is a necessary ingredient of such offences. It is also to be borne in mind that section 15 of the Evidence Act invites consideration of the question of intention, only as opposed to accident, and in connection with an offence under section 4 of Bombay Act IV of 1887 it appears to me that no question of accident can arise.

1903.

EMPEROR
v.
ALLOOMIYA
HUSAN.

1903.

EMPEROR
v.
ALLOOMIYA
HUSAN.

It is clear that the evidence cannot be let in under section 54, or under section 11 of the Evidence Act. I have not thought it necessary to refer to sections 310, 511, &c., of the Criminal Procedure Code. The provisions of these sections are directed to matter of procedure, on the assumption that the evidence is admissible.

I am of opinion, therefore, that the conviction, admittedly based in material part on the fact that the accused had been previously convicted, should be set aside, and that the accused should be re-tried. The previous convictions under section 5 would not in any view of the law be admissible. With regard to the discrepancies as to the discovery of the second pack of cards, though standing alone they might not be worthy of serious consideration, the fact that only one pack was endorsed on the warrant and sent up with the charge sheet is significant, and appears to require further explanation. On the third point, *viz.*, delay in execution of the warrant, I am unable to concur entirely in the opinion expressed by Mr. Justice Chandavarkar, but my difference of opinion will not affect the decision of this case.

Section 6 of Bombay Act IV of 1887 empowers any one of certain officials, on the event of certain conditions being fulfilled, to "give authority by special warrant under his hand when in his discretion he shall think fit" to a Police Officer of not less rank than an Inspector to enter, &c. This section read with section 7 imports a departure from the principle ordinarily enforced in criminal proceedings as to the incidence of the burden of proof, and it has been frequently held that the provisions of these sections must in consequence be strictly construed. It appears to me that the justifying reason for the new departure adopted in section 7 is to be found in the fact that the proceedings contemplated by section 6 involve the exercise by an experienced official of a carefully restricted class of a discretion, which, though applied to *ex parte* and it may be interested information, is essentially judicial. Now the *giving of the authority* by the *special warrant* —(the use of such guarded terms cannot be intended to have no significance, compare section 96 of the Criminal Procedure Code) —is in the exercise of that judicial discretion applied to facts as they have been brought to the knowledge of the authorising

official. In the course of time, it may be shorter or longer, according to circumstances, a change in those facts may be brought about; the house or place may be transferred to another occupant, or the same occupant may change his habits, or may cease to take profit or gain, and the result of delay in executing the warrant may thus result in virtual delegation of the carefully guarded discretion from the issuing to the executing official, which cannot have been the intention of the Legislature.

The provisions of section 75 (2) of the Criminal Procedure Code, which embody the principle affirmed in the English cases cited by my learned colleague, are indeed by section 101 of that Code made applicable to search warrants issued under that Code, but they are not in my opinion applicable to a special warrant issued under section 6 of the Bombay Gambling Act. To hold that they are applicable would also involve the application of the provisions of section 104, Criminal Procedure Code, to such special warrants, which would probably tend to defeat their object.

On the other hand, however, it would be absurd to hold that the warrant issued under section 6 of the Gambling Act must be forthwith executed. It appears to me that the question whether the delay has been reasonable or otherwise is one which must be decided with reference to the circumstances of the case. In the present case I am not disposed to hold that the delay of 19 days was unreasonable.

Owing to the above difference of opinion the case was, under section 429 of the Criminal Procedure Code (Act V of 1893), referred to Mr. Justice Aston.

S. B. Dady Burjor for the appellant (accused 1):—We contend that the Magistrate was not right in raising a presumption of guilt on the strength of section 7 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887). The Act must be construed strictly: *Queen-Empress v. Narottamdas Motiram* ⁽¹⁾; *Queen-Empress v. Govind* ⁽²⁾; *Queen-Empress v. Kanji Bhinji* ⁽³⁾; and, hence, section 7 must be held to apply to a conviction under section 5 only, and not under section 4 of the Act.

Moreover, the admission of irrelevant evidence as regards previous convictions had weighed with the Magistrate in coming

(1) (1889) 13 Bom. 681.

(2) (1891) 16 Bom. 283.

(3) (1892) 17 Bom. 184.

103.

EMPEROR
v.
ALLOOMIYA
HUSAN.

to a conviction. These previous convictions are not admissible under any provision of law, either under the Criminal Procedure Code (Act V of 1898) or the Evidence Act (I of 1872). Sections 220, 321, 310, 348 and 511 of the Criminal Procedure Code (Act V of 1898) deal with the procedure regarding such evidence and not with its admissibility or otherwise. Such evidence was formerly admissible under section 54, Evidence Act, I of 1872 (*Queen-Empress v. Kartick Chunder Das* ⁽¹⁾); but since its amendment by Act III of 1891, it is inadmissible. It is also inadmissible under section 14 or section 15 of the Evidence Act (I of 1872); for in an offence under section 4 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887), *viz.*, of keeping a common gaming house, there is no question of intention or guilty knowledge. No state of mind is relevant in this case: *Empress v. M. J. Vyapoory Moodeliar* ⁽²⁾; *Hollingham v. Heath* ⁽³⁾. As regards the dictum of Lord Hobhouse in *Powell v. Kempton Park Race-course Company* ⁽⁴⁾, on the phrase "use for the purpose," we rely on the opposite view taken by the Earl of Halsbury, L. C., in the same case at page 162.

We further contend that the warrant being a special warrant, must be executed forthwith, and not having been so executed, it must be taken to have spent itself, or in any event the presumption under section 7 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) ought not to be raised against us. The general rules regarding ordinary warrants under the Criminal Procedure Code (Act V of 1898) do not apply to this special warrant. The delay in execution of the warrant in the present case is far from reasonable and has not been accounted for.

Scott (Advocate General), with the Public Prosecutor, for the Crown:—The presumption under section 7 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) applies equally to sections 4 and 5 of the Act. There is nothing in the Act to limit or restrict its operation.

The evidence of previous convictions was rightly admitted either under section 11 or section 14 or section 15 of the Evidence Act (I of 1872). It is necessary to prove the intention of the

(1) (1887) 14 Cal. 721.

(2) (1881) 6 Cal. 655.

(3) (1858) 27 L. J. C. P. 241.

(4) (1899) A. C. 143.

accused and guilty knowledge is an ingredient of the offence. The prosecution had to prove that the present act of the accused formed one of a series of similar acts on his part.

As regards the legality of the warrant, the Court must so construe section 6 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) as to give some meaning to its provisions. To hold that the warrant should be executed forthwith is to make the section nugatory. Section 75 (2) of the Criminal Procedure Code (Act V of 1898) shows that a warrant shall remain in force until it is cancelled or executed. In any event, the delay in executing the warrant is not shown to be unreasonable.

ASTON, J.—It is, I consider, clearly proved by the evidence in this case that a room, of which the appellant is the occupier, was entered by certain Police Officers on the 7th June last under a warrant legally issued in accordance with the provisions of section 6 of the Gambling Act (Bombay Act IV of 1887) nineteen days previously, and that in the room thus entered under the warrant so issued, there were found playing-cards, and ten persons including the appellant.

The finding of cards under these circumstances constitutes legal evidence, until the contrary is made to appear, that this room is used as a common gaming house and that the persons found therein were present for the purpose of gaming even if no play was actually seen by the raiding party (see section 7 of the Act).

It has been contended by Mr. Dady Burjor who appeared for the appellant that section 7 of the Act has no application when there has been an interval of many days as in this case between the issue of the warrant and its execution. This argument is, I think, unsound, for no foundation for it can be discovered in any express words or necessary implication in the Act. It is, however, open to the appellant to ask the Court to treat what the Legislature declares in section 7 to be incriminating "evidence," as reduced in weight by any unreasonable delay which may take place between the issue of a warrant under section 6 and its execution. In the present case the delay is not shown to have been unreasonable.

1903.

EMPEROR

v.

ALLOOMIYA

HUSAN.

1903.

EMPEROR
*
ALLOOMIFA
HUSAN.

There is further evidence on the record which I think the Presidency Magistrate has rightly believed to be true. This evidence establishes the following additional facts. The ten men in the room when surprised were seated on the floor in a circle. Some of the cards were scattered about and some under a mat after the raiding party entered, but most of the persons in the room had cards in their hands when first seen. Money was found on the floor. When surprised there was at first general confusion and effort to escape and then a pretence of listening to the reading of one of the ten persons.

The offence of "keeping a common gaming house" of which appellant stands convicted under section 4 of the Gambling Act (Bombay Act IV of 1887) may be committed in any of the various ways set out in clauses (a), (b), (c), (d) of that section. It is sufficient at present to confine attention to clause (a)—"being the owner or occupier or having the use of any such house, room or place, opens, keeps, or uses the same for the purpose of a common gaming house"—though it may be observed that under clause (c) it would be useless for the appellant to plead that he was not the owner or occupier if he had "the care or management of, or in any manner assisted in conducting the business of any such house, room or place opened, occupied, kept or used for the purpose aforesaid."

The incriminating evidence on the record may be summarised as follows :—

- (1) The appellant is the occupier of the room in question.
- (2) When the room was entered under a warrant issued under the provisions of section 6 of the Act cards were found in the room. This has been declared by the Legislature (section 7) to be evidence until the contrary is made to appear that such room is used as a common gaming house, and that the persons found therein were there present for the purpose of gaming.
- (3) There were in fact nine persons besides the appellant, some of whom were playing cards in the presence of the appellant, and evidently playing for money.

To rebut the complete case made out by this evidence that this room was opened, kept or used by the appellant as a common gaming house, there is merely the bare assertion of the accused

that the persons present had met fortuitously each for a different purpose wholly unconnected with card-playing and that there was no card-playing at all—an assertion which the Magistrate, for, I think, good reasons, did not believe.

But it is contended for the appellant the conviction is vitiated because the Magistrate elicited from the appellant before he was convicted that he had been previously convicted of keeping a common gaming house and Mr. Dady Burjor argued first that the Magistrate treated this admission as part of the evidence on which he based the conviction appealed against: secondly, that this fact of a previous conviction was not legally admissible evidence to prove the offence of keeping a common gaming house for which the appellant was being tried.

The case was tried not by a jury but by a Magistrate who was judge of the law and the facts. He was presumably aware already from the papers before him that previous convictions were alleged against the appellant and he knew that a previous conviction if proved would afford legal ground for awarding more severe punishment in the event of the appellant being convicted by him. The Magistrate in setting out the evidence upon which he has held the charge against appellant proved has not included the admission of a previous conviction and the record does not afford indication that he took this admission into consideration except for the purpose of assessing punishment. If it is to be assumed (which I think unnecessary) that the admission of a previous conviction was treated by the Magistrate as part of the evidence upon which he based the conviction, the question arises was it admissible evidence under the provisions of the Evidence Act (I of 1872).

Section 54 of the Evidence Act (I of 1872) is as follows:—

“In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.

“*Explanation 1.*—This section does not apply to cases in which the bad character of any person is itself a fact in issue.

“*Explanation 2.*—A previous conviction is relevant as evidence of bad character.”

It is sufficiently clear from this section that in criminal proceedings the fact that the accused person has a bad character is

1908.

EMPEROR
V.
ALLOOMITA
HUSAN.

1933.

EMPEROR
v.
ALLOOMITA
HUSAN.

not relevant for the purpose of raising a general inference *from such bad character* that the accused person is likely to have committed the crime charged.

The second explanation says "a previous conviction is relevant as evidence of bad character." It does not say that a previous conviction is never relevant unless evidence of bad character is relevant or is itself a fact in issue, and even if it did go so far as to say this, it has to be remembered that the Evidence Act nowhere says that evidence may be given *only* of relevant facts.

Under section 5 "evidence" may be given in any suit or proceeding of the existence or non-existence of every fact in issue, and of such other facts as are hereinafter declared to be relevant, and of no others. The illustration (a) to that section is as follows :—

"A is tried for the murder of B by beating him with a club with the intention of causing his death.

At A's trial the following facts are in issue :—

A's beating B with club ;

A's causing B's death by such beating ;

A's intention to cause B's death."

The words "*for the purpose* of a common gaming house" occur in each clause of section 4 of the Gambling Act (Bombay Act IV of 1887) and guilty knowledge or intention becomes thus an essential ingredient of the offence defined in that section so that guilty knowledge or intention becomes a fact in issue when a person is tried for the offence of keeping a common gaming house.

Again section 14 of the Evidence Act enacts that facts showing the existence of any state of mind, such as intention, knowledge are relevant when the existence of any such state of mind is in issue or relevant, and (explanation 2) "where, upon the trial of a person accused of an offence, the previous commission by the accused of an offence is relevant within the meaning of this section, the previous conviction of such person shall also be a relevant fact."

Under section 11 of the same Act, facts not otherwise relevant are relevant if by themselves or in connection with other facts, they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

If the prosecution had been in a position to prove that the appellant had habitually on many occasions used this very room or another room in his occupation as a common gaming house by the direct evidence of persons who had gambled there, such a fact would make the existence of the guilty intention or knowledge imputed in the present charge highly probable, and under the sections 5, 11 and 14 quoted from the Evidence Act (with which section 54 must be read) such fact would be admissible in evidence. Previous conviction might be a mode of proving such a use on some of the previous occasions, but it can hardly be contended that such previous convictions are inadmissible if the use for such criminal purpose could be allowed to be proved by other evidence.

I therefore concur in the opinion of Mr. Justice Chandavarkar that in a trial for an offence of keeping a common gaming house under section 4 of the Gambling Act (Bombay Act IV of 1887) evidence that the accused had been previously convicted of the same offence is admissible to show guilty knowledge or intention.

I have assumed in dealing with this part of the argument for the appellant, that the Presidency Magistrate did take into consideration for the purposes of conviction, the previous conviction admitted by the appellant, but I have said that in my opinion it is not necessary to make this assumption. It is, I think, under the circumstances already set out more probable that the Presidency Magistrate's object in putting the question as to previous conviction was to ascertain whether in the event of conviction formal evidence as to alleged previous convictions and as to identity of the accused could be dispensed with.

Section 342 of the Code of Criminal Procedure (Act V of 1898) enacts that "for the purpose of enabling the accused to explain any circumstances appearing in evidence against him, the Court may, at any stage of any inquiry or trial, without previously warning the accused, put such questions to him as the Court considers necessary, and shall for the purpose aforesaid question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence."

It is under this section that the appellant appears to have been examined by the Magistrate.

1903.

EMPEROR

v.

ABLOOMITA
MUSAN.

1932.

EMPEROR
v.
ALLOOMIYA
HUSAN.

If the question was put by the Magistrate under the belief that a previous conviction of appellant under section 4 of the Gambling Act (Bombay Act IV of 1887) could be taken into consideration for the purpose of conviction, then the question was not authorised by section 342 of the Criminal Procedure Code, its object not being to enable the accused to explain any circumstances appearing in the evidence against him.

If, on the other hand, the object of the question was to ascertain whether, in the event of conviction, formal evidence as to alleged previous convictions and as to identity of the accused could be dispensed with, the question was equally unauthorised at that stage by the provisions of section 342, Criminal Procedure Code, so that it may well be contended that inquiry of any sort into the fact of previous convictions for the latter object should have been postponed until after actual conviction of the appellant in this case.

On the view which I take of the evidence, independent of the appellant's admission of previous conviction, it is unnecessary to pursue this matter, as on that view it becomes equally immaterial in the present appeal whether the Presidency Magistrate in fact treated that admission as part of the evidence establishing the offence charged, or whether it was improper so to treat it.

Independently of the evidence objected to there was, as already shewn above, sufficient evidence to justify the conviction.

Section 167 of the Evidence Act (I of 1872) enacts that "the improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision." The conviction appealed against is therefore confirmed.

The case does not appear to be one in which, even taking into consideration previous convictions, the maximum fine allowed for the offence is required. Having had the advantage of consulting Mr. Justice Chandavarkar and Mr. Justice Jacob before whom this appeal has been also argued, I reduce the fine to Rs. 250 or in default three weeks' imprisonment. The balance of fine, if paid, to be restored.

Conviction confirmed. Sentence reduced.

APPELLATE CIVIL.

Before Mr. Justice Aston and Mr. Justice Jacob.

HASSANBHAI VALAD BUDHANBHAI (ORIGINAL DEFENDANT 2), APPELLANT, *v.* UMAJI BIN HIRAJI AND CHIMNAJI BIN MANAJI (ORIGINAL PLAINTIFF AND DEFENDANT 1), RESPONDENTS.*

1903.
September 3.

Transfer of Property Act (IV of 1882), sections 75, 85, 86, 91—Prior mortgagee—Subsequent mortgagee—Rights to redeem inter se—Foreclosure decree.

In 1859 C and his brothers mortgaged certain lands with possession to H. Subsequently, on the 23th May, 1897, C alone mortgaged the same lands to U. Shortly after this C and his brothers brought a redemption suit against H and U was not made a party to it. In that suit the usual redemption decree was passed; but as C and his brothers failed to redeem within the time allowed, the order for foreclosure was made absolute in favour of H. U then brought a suit against C to recover his mortgage debt by sale of the mortgaged property; to this suit H was joined as the person in possession. The lower Court allowed U to redeem the property from H (defendant 2) on payment of the money due to him (defendant 2) under the foreclosure decree:

Held, reversing the decree, that H, the prior mortgagee, had a right to redeem superior to that of U, the subsequent mortgagee.

SECOND appeal from the decision of F. C. O. Beaman, District Judge of Poona, confirming the decree passed by K. R. Jalihal, Subordinate Judge at Khed.

Chimnaji (defendant 1) and his brothers mortgaged with possession the lands in dispute to Hassanbhai (defendant 2) in 1859 for Rs. 300.

Subsequently, on the 26th May, 1897, Chimnaji alone mortgaged the lands to Umaji (plaintiff) for Rs. 100.

Shortly after this, *i. e.*, on 2nd June, 1897, Chimnaji and his brothers brought a redemption suit (Suit No. 153 of 1897) against Hassanbhai. To this suit Umaji was not made a party. On the 29th March, 1898, a redemption decree was passed, ordering Chimnaji and his brothers to pay Rs. 300 to Hassanbhai within seven months, and in default to be for ever foreclosed. Chimnaji and his brothers failed to pay the sum within the time allowed; and on the 17th February, 1899, the foreclosure order was made absolute in favour of Hassanbhai.

* Second Appeal No. 76 of 1903.

1903.

HASSANBHAI

v.
UMAJI.

On the 14th June, 1899, Umaji sued Chimnaji and Hassanbhai to recover his Rs. 100 and interest by sale of the mortgaged property, and the deficiency, if any, from defendant 1 personally.

Defendant 1 admitted execution of the mortgage to plaintiff and prayed for an instalment decree.

Defendant 2 contended that he was originally a mortgagee, but that under the decree in suit 156 of 1897 he had become full owner and was in possession of the lands as such.

The Subordinate Judge ordered that "plaintiff do redeem and recover possession of the property in suit from defendants 1 and 2 by payment of Rs. 300 to defendant 2." The grounds of this order were expressed as follows :—

"Plaintiff, a mortgagee at date of old Suit No. 156 of 1897, was not made a party to it by defendant 2 and so plaintiff has a right of redemption, being a subsequent mortgagee. Defendant 2 has become full owner against defendant 1 only and not against plaintiff who was not a party. Plaintiff is willing to redeem by payment of Rs. 300, amount of the foreclosure decree. Defendant 2 objects to this redemption, but plaintiff having a right of redemption he is allowed to redeem."

On appeal, this decree was confirmed by the District Judge.

Defendant 2 appealed to the High Court.

B. N. Bhajekar for the appellant (defendant 2) :—Chimnaji, when he brought Suit No. 156 of 1897, was fully aware of the second mortgage, and he ought to have made Umaji a party to that suit as he was required to do under section 85 of the Transfer of Property Act (IV of 1882). Hassanbhai was not bound to make Umaji a party in that suit, as he was not aware of the mortgage in favour of Umaji. We concede that the puisne mortgagee has generally the right to redeem and the right to sell (*Debendra Narain Roy v. Ramtaran Banerjee*⁽¹⁾), but we contend that these rights are subject to the rights of the first mortgagee. In Suit 156 of 1897 Chimnaji failed to redeem within the time allowed: and on application of Hassanbhai the Court passed a foreclosure order in his favour. Hassanbhai thenceforth became the owner of the property in suit and his old mortgage rights merged into the right of ownership that he thus acquired. The case of *Perumal v. Kaveri*⁽²⁾ is in our favour, and the remarks of Muttusami Iyyar, J., seem conclusive. In the case of *Maganal v.*

(1) (1903) 30 Cal. 599.

(2) (1892) 16 Mad. 121.

Shakra ⁽¹⁾ Farran, C. J., held that in a foreclosure suit the rights of mortgagor and mortgagee pass to the purchaser; and we are in this case in the position of such purchaser. Again, the Privy Council case of *Umes Chunder v. Zakur Fatima* ⁽²⁾ is in our favour. It settles the question in the present case, and Hassanbhai, who has become owner and is willing to pay off Umaji, is not liable to pay the money due to Umaji on the second mortgage. Further, the case of *Radhabai v. Shamrao* ⁽³⁾ supports our contention: and the case of *Mohan v. Togu* ⁽⁴⁾ is really not opposed to *Radhabai v. Shamrao*, ⁽³⁾ for it will be found in the statement of the facts of the case that the first mortgagee was in that case unwilling to pay off the second mortgagee. The case of *Mohan v. Togu* ⁽⁴⁾ was followed in *Desai Lallubhai Jethabhai v. Mundas Kuberdas*, ⁽⁵⁾ but it does not eliminate the point of the unwillingness of the first mortgagee to pay off the second mortgagee. If any other view is taken then the case of *Mohan v. Togu* ⁽⁴⁾ seems directly in conflict with the earlier case of *Radhabai v. Shamrao*. ⁽³⁾ The judgment in *Mohan v. Togu* cited *Wasudev Balaji v. Narayan Krishna* ⁽⁶⁾ and *Mansukh Pitambar v. Tarbhovan Parshotam*. ⁽⁷⁾ These cases as reported in the Printed Judgments do not contain statements of facts; but a reference to the paper books in both of them makes it clear that the first mortgagee in either case was unwilling to pay off the amount of the second mortgage and it was therefore that the redemption by second mortgagee was ordered. Section 75 of the Transfer of Property Act (IV of 1932) does not come in our way, as it relates to the rights of mortgagees *inter se*. In the present case Hassanbhai has ceased to be a mortgagee and has become an owner. The case of *Shaik Abdulla Saiba v. Haji Abdulla* ⁽⁸⁾ decides that a purchaser in a foreclosure suit buys the interest of the mortgagor as it existed at the date of mortgage and not as it existed at the date of sale. The case of *Damodar*

1903.

HASSANBHAJ

v.
UMAJI.

(1) (1897) 22 Bom. 945.

(2) (1890) 18 Cal. 164.

(3) (1881) 8 Bom. 168.

(4) (1885) 10 Bom. 224.

(5) (1895) 20 Bom. 390.

(6) (1882) P. J. 21.

(7) (1882) P. J. 213.

(8) (1880) 5 Bom. 8.

1903.

HASSANBHAI

v.

UMAJI.

Devchand v. Naro Mahadev⁽¹⁾ is not in point, as it does not state which of the mortgagees was entitled to redeem *inter se*. The question, as to who, as between the Court-purchaser under the prior mortgage decree and a second mortgagee, is entitled to pay off the other, was not settled. In that case the purchaser by pulling down the house in suit had practically refused to recognize the second mortgagee's claim for money. The cases of *Naran Parshotam v. Dolatram Virchand*⁽²⁾ and *Shivram v. Genu*⁽³⁾ are silent on the point raised in this suit. The head-note of *Sankana Kalana v. Virupakshapa Ganeshapu*⁽⁴⁾ is rather misleading; and the case has been dissented from in *Perumal v. Kaveri*.⁽⁵⁾

Our next contention is that Umaji in this suit originally sued only for the recovery of his mortgage debt by sale of the property mortgaged. He did not seek to redeem Hassanbhai, the prior mortgagee. The Court of first instance suggested that course to him; and even then all that Umaji did was to state through his pleader that if the Court allowed him to redeem the prior mortgagee he was willing to do so. The plaint was not amended and no alternative prayer was made at any time. And although the Court ordered Umaji to redeem by paying Rs. 366 to Hassanbhai, in spite of his original claim for Rs. 146, he has as yet paid no additional Court-fees over the increased amount. Hence, in any view of the case, Umaji is precluded from claiming redemption from Hassanbhai, who is himself willing to redeem Umaji.

G. S. Mulgaonkar, for respondent No. 1 (plaintiff) :—The first point we have to meet is whether the order of redemption made by the Courts below is right when our suit related only to the recovery of the mortgage amount by sale of the mortgaged property. Section 53 of the Civil Procedure Code (Act XIV of 1882) applies to cases of inconsistent causes of action. In this case the cause of action is one; the remedies are different. An alteration in relief does not alter the character of the suit: *Kashinath Das v. Sadashiv Patnaik*,⁽⁶⁾ *Parshotam v. Rupal*,⁽⁷⁾ *Ibra-*

(1) (1881) 6 Bom. 11.

(2) 1882) 6 Bom. 538.

(3) (1882) 6 Bom. 515.

(4) (1883) 7 Bom. 146.

(5) (1892) 16 Mad. 121.

(6) (1893) 20 Cal. 805.

(7) (1895) 20 Bom. 196.

himbhai v. Fletcher,⁽¹⁾ *Damodar v. Naro Mahadev*.⁽²⁾ The puisne mortgagee has two remedies open to him: (1) sale and (2) redemption. He can claim the one or the other in the same suit in the alternative: *Debendra Narain v. Ramtaran Banerjee*,⁽³⁾ *Umes Chundar v. Zakur Fatima*,⁽⁴⁾ and *Damodar v. Naro Mahadev*.⁽²⁾ That it was not necessary to amend the plaint is shown by the above Bombay cases. The lower Courts have exercised their discretion and the High Court cannot in second appeal interfere with it.

The second point raised by the appellant is as to who, as between the prior and puisne mortgagee, has the superior right of redeeming the other. We submit that a long course of decisions of all the High Courts affirm the right of the puisne mortgagee to redeem the prior mortgagee who has foreclosed his mortgage in a suit to which the puisne mortgagee was not a party. *Desai Lallubhai v. Mundas*⁽⁵⁾ distinctly lays down the principle. See also *Baldeo Singh v. Jaggu Ram*,⁽⁶⁾ *Alla Bakhs v. Madho Ram*,⁽⁷⁾ *Wasudev Balaji v. Narayan Krishna*,⁽⁸⁾ *Mansukh Pitambar v. Tarbhovan Parshottam*.⁽⁹⁾ These cases lay down that, as between prior and puisne mortgagees, it is the puisne mortgagee's right to redeem the prior one. It will be denying that right if the prior mortgagee is allowed to redeem him. Section 75 of the Transfer of Property Act (IV of 1882) lays down the same rule. See Snell's Principles of Equity, pp. 336-337; Ghose on Mortgage, pp. 298, 299 (3rd Edn.). We redeem up and foreclose down. It was no fault of ours that we were not parties to the foreclosure suit: and the order in that suit is not binding on us. If no such suit had been brought, and if there had been no foreclosure decree, we would, under section 75 of the Transfer of Property Act (IV of 1882), have the right to redeem. Why then should that suit affect our rights? The prior mortgagee is, in spite of the foreclosure order, so far as we are concerned, still a mortgagee. The mortgagor's equity of redemption against

1903.

HASSANBHAI
v.
UMAJI.

(1) (1896) 21 Bom. 827.

(2) (1881) 6 Bom. 11.

(3) (1903) 30 Cal. 599.

(4) (1889) 18 Cal. 164.

(5) (1895) 20 Bom. 390.

(6) (1900) 23 All. 1.

(7) (1900) 23 All. 22.

(8) (1882) P. J. p. 21.

(9) (1882) P. J. p. 213.

1908.

HASSANBHAI

v.
UMAJI.

the prior mortgagee may have been extinguished: but so far as our mortgage is concerned the mortgagor has still the right to redeem us, though he may have lost his right to redeem the prior mortgagee. But if we redeemed the prior mortgagee then the right of redeeming the prior mortgage in our hands would revive in favour of the mortgagor: see Ghose on Mortgage, pp. 741, 742 (3rd Edn.). The case of *Maganlal v. Shakra Girdhar*⁽¹⁾ is in our favour, as showing that defendant No. 3, who stood in the shoes of the puisne mortgagee, was allowed to redeem the prior mortgagee. The case of *Perumal v. Kaveri*⁽²⁾ is not followed by the later Madras cases. Besides, the learned Judges in that case have relied upon *Ayyavayyar v. Rahimansa*⁽³⁾ to show that each case depends upon its own peculiar facts. In *Radhabai v. Shamray*⁽⁴⁾ the prior mortgagee was no doubt given an opportunity to redeem the puisne mortgagee, but that was under the peculiar circumstances of the case, as pointed out in *Dadoba v. Damodar*⁽⁵⁾. The case of *Radhabai v. Shamray*⁽⁴⁾ is distinguished in *Baldeo Singh v. Jaggu Ram*⁽⁶⁾. The decision in *Sankana v. Virupakshapa Ganeskapa*⁽⁷⁾ says nothing about the prior mortgagee's option to redeem the puisne mortgagee. In *Shivram v. Genu*⁽⁸⁾ the puisne mortgagee was held entitled to redeem the prior mortgagee. The case of *Umes Chunder v. Zahur Fatima*⁽⁹⁾ is not against us. It affirms the rule that we have the right to redeem the prior mortgagee. No doubt the prior mortgagee is allowed to redeem the puisne mortgagee; but that is not allowed him *quod* prior mortgagee, since the properties are not identical. The positions of the parties became changed. The prior mortgagee was allowed the right to redeem in the capacity of a puisne mortgagee with respect to the second redemption. The decisions of the lower Courts are, therefore, on principle and authority, correct.

ASTON, J. :—The facts in this case are simple. One Chinnaji and his three brothers mortgaged the plaint land with possession

(1) (1897) 22 Bom. 945.

(2) (1892) 16 Mad. 121.

(3) (1890) 14 Mad. 170.

(4) (1881) 8 Bom. 168.

(5) (1891) 16 Bom. 483 at p. 491.

(6) (1900) 23 All. 1.

(7) (1883) 7 Bom. 143.

(8) (1882) 6 Bom. 515.

(9) (1890) 18 Cal. 164.

to Hasan for Rs. 300. After that Chimnaji alone mortgaged the same property, of which he had become sole owner, to Umaji for Rs. 100.

Still later Chimnaji and his three brothers brought a redemption suit against Hasan to redeem the prior mortgage without joining the subsequent mortgagee, Umaji. A decree was passed ordering the mortgagors to pay Rs. 300 to Hasan within seven months or to be for ever foreclosed. The mortgagors failed to pay, and Hasan, the prior mortgagee, who was and is in possession, obtained an order absolute for foreclosure.

Then Umaji, the subsequent mortgagee, brought this suit against Chimnaji, defendant 1, as his mortgagor, and against Hasan, defendant 2, as a person said to have some interest in the plaint land. The relief sought in the plaint was to recover Rs. 147-13-0 as principal and interest to date of suit and costs and future interest by sale of the mortgaged property and the deficiency, if any, from Chimnaji, defendant 1, personally. The Subordinate Judge held that Umaji as a subsequent mortgagee was entitled to redeem Hasan who, he held, occupied the position merely of prior mortgagee towards Umaji, because Umaji was not a party to the suit in which the prior mortgage became foreclosed. He treated the suit to recover by sale of the mortgaged property the debt, Rs. 147-13-0, due under the subsequent mortgage as if it were a suit to redeem the prior mortgage and decreed as follows: "Plaintiff to redeem and recover possession of the property in suit from defendants 1 and 2 by payment of Rs. 300 to defendant 2 within two years from this date, and on failure to do so plaintiff do stand barred of all right to redeem. Each party to bear his own costs."

Hasan appealed against this decree, and in his grounds of appeal raised the contentions that he had become absolute owner in virtue of the previous foreclosure decree absolute, that as he was ready to pay Rs. 147-13-0 to plaintiff a decree should have been made accordingly, and that it was an error to award relief beyond the terms of the plaintiff's prayer which was that Rs. 147-13-0 should be awarded by sale of the mortgaged property or from defendant 1 personally.

The District Judge, holding that plaintiff has a right to treat his suit as against Hasan, defendant 2, as though it were a suit

1903.

HASANBHAI

v.

UMAJI.

1903.

HASSANBHAI

v.

UMAJI.

for redemption, because plaintiff was not a party to the suit which the mortgagors brought to redeem the prior mortgage to Hasan, confirmed the decree without discussing the question whether the suit brought to recover the money due on the subsequent mortgage by sale of the mortgage property ought to have been treated as a suit to redeem the prior mortgagee, Hasan, and merely to redeem Hasan.

Hasan brings this second appeal, repeating the contentions already mentioned.

The first point for decision is whether it was wrong to treat this suit of Umaji, plaintiff and present respondent No. 1, as one brought to redeem Hasan. Hasan's plea in defence to this suit was from the outset that he had, in virtue of the decree absolute for foreclosure in the Suit No. 156 of 1897 brought by the mortgagors against himself for redemption, become full owner and was in possession. The issues upon which the parties went to trial were (1) has defendant 2 (*i. e.*, Hasan) become full owner of the land in suit as against plaintiff as alleged by him? (2) what relief, if any, is plaintiff entitled to against defendant 1 and against defendant 2?

There is thus no room for contending that the decree contravenes the general rule that "relief not founded on the pleadings should not be granted:" see the Privy Council decision in *Sri Mahant Govindrao v. Sita Ram Kesho*.⁽¹⁾ It is contended, however, for Hasan, appellant, that what the lower Courts have done amounts practically to allowing the suit to be converted into a suit of another and inconsistent character which is forbidden by section 53 of the Civil Procedure Code (Act XIV of 1882).

Looking to the substance and not to the form of the suit, the plaintiff was clearly seeking relief on the basis of the right of a mortgagee. When the pleadings were complete it appeared that his mortgage was subsequent in date to that which Hasan had taken of the same lands and had foreclosed. The contest thus became one between, on the one hand, a prior mortgagee in possession who had obtained a decree absolute for foreclosure and, on the other hand, a subsequent mortgagee who had not

(1) (1898), 21 All. 53 p. 69.

been made a party to the redemption suit in which that final decree for foreclosure was made.

The issues were framed in such terms as to afford full opportunity of bringing forward appropriate evidence, and the parties had by the pleadings been made fully alive to the questions that had to be argued. These essentials, pointed out in *Sayad Muhammad v. Fattah Muhammad*⁽¹⁾, therefore, are not wanting. The relief decreed was appropriate in a degree to the decision arrived at under these issues. Whether all the equities covered by those issues were sufficiently provided for in the decree is another matter altogether. There was, in my opinion, no greater inconsistency in the character of the suit as disclosed in the plaint and as treated in the issues framed than exists between a suit for ejectment and a suit for redemption where a relation of mortgagor and mortgagee is established.

It would be difficult after the decree passed by the Privy Council in *Nilakant v. Sures Chunder*⁽²⁾ to hold that the Court cannot in its discretion pass a decree for redemption in a case in which the plaintiffs have sued in ejectment. Per Sargent, C. J., in *Parshotam Bhaishankar v. Rupal Zunjar*.⁽³⁾

In *Kashinath Das v. Sadashiv Patnaik*,⁽⁴⁾ decided by the Calcutta High Court it was remarked:—"The law prohibits any such amendment as would change the fundamental character of the suit; for example, a plaint cannot be so amended as to convert a claim based upon contract into an action on tort. But an alteration in the relief does not alter the character of a suit."

It appears to me, therefore, that the contention that the lower Courts had no discretion to decree redemption of Hasan instead of the relief prayed in the plaint, must fail.

The next and main point for decision is whether, looking to the equities on both sides, Hasan, the prior mortgagee, who had already obtained a final decree for foreclosure against the mortgagors and was in possession, ought to have been given an opportunity to redeem Umaji, the subsequent mortgagee.

When a mortgagor executes a second mortgage he charges his equity of redemption to the extent of that subsequent mortgage :

(1) (1894) 22 I. A. 4; 22 Cal. 324.

(3) (1895) 20 Bom. 196.

(2) (1885) 12 I. A. 171.

(4) (1893) 20 Cal. 805 at p. 808.

1903.

HASSANBHAI
v.
UMAJI.

1903.

HASSANBHAI
v.
UMAJI.

Damodar v. Naro,⁽¹⁾ *Radhabai v. Shamrao*.⁽²⁾ The puisne mortgagee is, under section 75 of the Transfer of Property Act (IV of 1882) as well as a long course of decisions of this Court (*Desai Lallubhai v. Mundas*)⁽³⁾ and the cases there cited), entitled to redeem a prior mortgagee, and must be joined to a redemption suit, section 85 of the Transfer of Property Act, because a puisne mortgagee represents the equity of redemption to the extent of his own mortgage and as such is entitled to have an opportunity to redeem the prior mortgage and cannot be deprived of that right by proceedings to which he was not a party : *Damodar v. Naro*.⁽¹⁾

If a mortgagee "puts the Court in motion to sell, he is held to be estopped from denying that his interest as mortgagee has passed under the sale of the right, title and interest of the mortgagor or his heirs to the purchaser : " per Westropp, C. J., in *Shaik Abdulla Saiba v. Haji Abdulla*.⁽⁴⁾

When such a sale has been effected under a decree obtained by a mortgagee it is usually said that "the right, title and interest of the mortgagor as it stood *when he was making the mortgage* (and not merely as it stood at the time of the Court-sale) is what passes under the certificate of sale to the purchaser : " *ibid* at page 13, *Kasandas Laldas et al v. Pranjivan Asharam*,⁽⁵⁾ *S. B. Shringarpure v. S. B. Pethe*⁽⁶⁾ and *Ravji Narayan v. Krishnaji Lakshman*,⁽⁷⁾ and that the purchaser at a sale in execution of a decree on a mortgage acquires the estate of the mortgagor as it existed when he executed the mortgage (*Dadoba Arjunji v. Damodar Raghunath*)⁽⁸⁾ free from all subsequent incumbrances subject only to the right of a puisne mortgagee to redeem him if he so desire : *Desai Lallubhai Jethabhai v. Mundas Kuberdas*.⁽⁹⁾ Also where the decree is for foreclosure, not for sale, the prior mortgagee who forecloses the mortgagor is liable to be redeemed by any puisne mortgagee who might have been but was not made a party to his suit : *Sankana v. Virupakshapa*.⁽⁹⁾

(1) (1881) 6 Bom. 11.

(2) (1881) 8 Bom. 168.

(3) (1895) 20 Bom. 390.

(4) (1880) 5 Bom. 8 at p. 13.

(5) (1870) 7 Bom. H. C. R. A. C. J. 146.

(6) (1878) 2 Bom. 662.

(7) (1874) 11 Bom. H. C. R. 139.

(8) (1891) 16 Bom. 486.

(9) (1883) 7 B. m. 146.

It follows from the authorities already cited that when the equity of redemption vested in the mortgagor has become charged by a subsequent mortgage before the suit on which foreclosure is decreed the estate acquired by the prior mortgagee who forecloses behind the back of the puisne mortgagee is subject to that charge on the equity of redemption so long as the subsequent mortgage remains unredeemed. The charge is limited to the extent of the subsequent mortgage and the right to redeem which that charge on the equity of redemption gives to the puisne mortgagee is not defeated by proceedings to which the puisne mortgagee is not made a party. But it does not follow that the mortgagor's interest in the equity of redemption cannot be acquired by the prior mortgagee in proceedings to which the puisne mortgagee is not a party as effectively as it could be acquired by, say, a purchase for valuable consideration. No principle of law or equity has been advanced to show why a prior mortgagee who forecloses behind the back of a puisne mortgagee should be treated as less entitled to redeem the puisne mortgage than a prior mortgagee who becomes owner by purchase of his mortgagor's interest in the equity of redemption, in other words, the equity of redemption burdened with the charge created by the puisne mortgage to the extent of the subsequent mortgage.

The mortgagor's interest in the equity of redemption was fully represented in the Suit 156 of 1897, and if Hasan in virtue of his acquisition of that interest is entitled to redeem the puisne mortgagee Umaji and entitled to exercise that right whether in preference to, or subsequent to the exercise of, the right of a puisne mortgagee to redeem him when viewed merely as a prior mortgagee, then, upon such redemption by Hasan taking place, the second mortgage to Umaji would become extinguished and with such extinction would disappear any right to redeem which Umaji might otherwise be able to set up as vesting in him under section 75 or section 91 of the Transfer of Property Act so long as his mortgage may subsist.

It must be borne in mind that the equity of redemption vested in the mortgagor or his representatives or assignees is an absolute indefeasible right which cannot be resisted by a mortgagee,

1903.

HASANBHAI

v.
UMAJI.

1903.

HASANBHAI

v.
UMAJI.

for the mortgagor is "absolute owner,"⁽¹⁾ the interest in the equity of redemption acquired by a puisne mortgagee is part of his title as a puisne mortgagee and is subject therefore to the infirmities of a mortgagee's title, one of which is the liability to be redeemed.

Mr. Mulgaonkar's argument amounted to this, that as his client was not made a party to the redemption Suit 156 of 1897 he is entitled to ignore the order absolute passed in that suit foreclosing the mortgage to Hasan : that his client Umaji as a puisne mortgagee is entitled to redeem Hasan, the prior mortgagee, and, if Umaji himself is liable to be redeemed, that can be done only by the mortgagor Chimnaji whose interest in the equity of redemption has not according to the argument passed to Hasan because Umaji was not a party to the redemption suit in which Hasan's mortgagors were foreclosed. Mr. Mulgaonkar did not contend that the right of the mortgagor to redeem is not paramount if still subsisting.

There appears to me to be some unreality about this argument, seeing that the mortgagor Chimnaji is a party to the present suit, and the rights of Chimnaji and Hasan *inter se* have been finally adjudicated in Suit 156 of 1897. Mr. Mulgaonkar relies upon section 75 of the Transfer of Property Act (IV of 1882) as declaring his right to redeem and on the numerous decisions of this Court in which the right of the puisne mortgagee to redeem a prior mortgagee notwithstanding foreclosure of the mortgagor behind a puisne mortgagee's back has been affirmed, and he also relies upon a passage in Ghose on the Law of Mortgage to which reference will be made later on.

Section 75 of the Transfer of Property Act (IV of 1882) provides that "every second or other subsequent mortgagee has, so far as regards redemption, foreclosure and sale of the mortgaged property, the same rights against the prior mortgagee as his mortgagor has against such prior mortgagee or mortgagees, and the same rights as against the subsequent mortgagees, if any, as he has against his mortgagor." Mr. Mulgaonkar relied specially on *Desai Lallubhai v. Mundas* ⁽²⁾ and the cases there

(1) *Pugh v. Heath* (1862) 7 App. Cas. 235 at p. 238.

(2) (1895) 20 Bom. 390.

cited, though it must be noted that in *Desai Lallubhai's case* the prior mortgagee was unwilling to redeem the second mortgagee and the Court ruled he was not compelled to redeem. Mr. Bhajekar for appellant Hasan contends that mere affirmation in section 75 of the Transfer of Property Act or in decided cases of the right of a puisne mortgagee cannot be treated as deciding that a prior mortgagee, who obtains a foreclosure decree absolute in a suit to which a subsequent mortgagee is not joined, has no right to redeem the subsequent mortgagee if he so choose instead of submitting to be redeemed himself by the subsequent mortgagee, or if he must submit first to be redeemed that he cannot in such circumstances, in virtue of his having acquired the mortgagor's interest in the equity of redemption, redeem in his turn the subsequent mortgagee by paying whatever may be the debt.

It is necessary therefore to take a wider view of the authorities. Section 91 of the Transfer of Property Act enacts that: "Besides the mortgagor, any of the following persons" (amongst others) "may redeem or institute a suit for redemption of the mortgaged property:—(a) any person (other than the mortgagee of the interest sought to be redeemed) having any interest in, or charge upon, the property; (b) any person having any interest in, or charge upon, the right to redeem the property."

The redemption by Umaji of Hasan would not extinguish the owner's interest in the land which must be somewhere and cannot be in abeyance. The position of the title as long as the mortgage is redeemable is described by Lord Hardwicke in the leading case of *Casborne v. Scarfe* ⁽¹⁾: "An equity of redemption has always been considered as an estate in the land, for it may be devised, granted, or entailed with remainders and such entail and remainders may be barred by fine and recovery, and therefore cannot be considered as a mere right only, but such an estate whereof there may be a seisin. The person therefore entitled to the equity of redemption is considered as the owner of the land."

"The interest in the land must be somewhere and cannot be in abeyance; but it is not in the mortgagee and therefore must remain in the mortgagor."

1903.

HASSANBHAI
v.
UMAJI.

(1) 2 White & Tudor's L. C. 6, 7th Ed.

1903.

HASANBHAI

v.

UMAJI.

What then is the position of the title after an order of foreclosure absolute?

"The effect of an order of foreclosure absolute is to vest the ownership of, and the beneficial title to, the land, for the first time, in the person who previously was a mere incumbrancer. The equitable estate of the mortgagor is then forfeited and transferred to the mortgagee. It is transferred as effectually as if it had been conveyed or re-leased. "A foreclosure" (said Lord Hardwicke) "is considered as a new purchase of the land." "The mortgage being foreclosed" (said Sir Wm. Grant) "the estate became absolutely his." "By the order made in the foreclosure suit" (said Sir Lancelot Shadwell) "he became the absolute owner,"—per Lord Selborne, L. C., in *Heath v. Pugh*.⁽¹⁾ "The decree absolute gave a new right, confirmed a new estate," per Lord O'Hagan in the same case on further appeal (L. R. 7 A. C. at p. 289).

Thus looking to principle it would appear that the fact that the second mortgagee Umaji's interest in the equity of redemption was not represented in the suit in which Hassan the prior mortgagee obtained an order absolute for foreclosure can no more prevail to save Umaji from being redeemed as to his charge on the equity of redemption than if there had been no foreclosure but some third person had bought the right, title and interest of the mortgagor (that is, the property subject to the mortgages to Hasan and Umaji) and were now suing to redeem Umaji.

Turning next to decided cases, *Unes Chunder Sircar v. Zukur Fatima*⁽²⁾ may be cited to show that their Lordships of the Privy Council (*see* at page 178) did not question the proposition that at any time before actual sale the mortgagor himself and anybody to whom he may have transferred the property can come in and redeem the property by paying the debt.

In the present case the appellant Hasan, as already pointed out, has added to his rights the mortgagor's interest in the equity of redemption.

In the respondent No. 1, Umaji, we have a second mortgagee who was not a party to the redemption suit and has therefore still

(1) (1831) 6 Q. B. D. 345 at p. 360.

(2) (1890) 18 Cal. 164.

a right to redeem Hasan so long as his own charge on the equity of redemption subsists. That charge can be got in by redeeming Umaji. The question then is why should not the right of Hasan to redeem the puisne mortgagee be enforced in this suit even if it be held that Hasan must first submit to be himself redeemed by Umaji?

In *Radhabai v. Shamrao* ⁽¹⁾ a prior mortgagee, Sitabai, obtained a decree for sale against the mortgagor Anandrao behind the back of a puisne mortgagee and Shamrao was the Court purchaser. The puisne mortgage was with possession. In a suit between Shamrao as plaintiff and Radhabai this Court allowed Shamrao to redeem Radhabai, the puisne mortgagee, and Westropp, C.J., said: "No doubt the decree in Sitabai's suit bound the mortgagor Anandrao Bapuji (who was a party to Sitabai's suit), so far as his right to redeem is concerned, and, therefore, the plaintiff has a good title to the interest of Anandrao Bapuji and is accordingly entitled to redeem the lands from Radhabai's mortgage." ⁽²⁾

In *Dadoba Arjunji v. Damodar Raghunath* ⁽³⁾ Sargent, C. J., observed that the circumstances in *Radhabai v. Shamrao* ⁽¹⁾ were of a special nature and it may perhaps be open to doubt whether the decision is reconcilable with the ruling in *Kasandas Ialldas et al v. Pranjivan Asharam* ⁽⁴⁾, *Shaik Abdulla v. Haji Abdulla*, ⁽⁵⁾ and *Rupchand v. Darlatrav* ⁽⁶⁾ that a purchaser at a sale in execution of a decree on a mortgage acquires the estate of the mortgagor as it existed when he executed the mortgage.

Mr. Mulgaonkar, for respondent No. 1, Umaji, argued that the above observation should be treated as casting doubt on the proposition that when the equity of redemption so charged to the extent of a second mortgage has become merged in the title acquired by the Court purchaser at a sale effected in the suit of the prior mortgagee the Court purchaser cannot get in that charge and complete his title if he so pleases by redeeming the second mortgage; but it is not apparent why such a construction should be put upon that observation.

(1) (1881) 8 Bom. 163.

(2) (1881) *Ibid.* p. 173.

(3) (1891) 16 Bom. 486 at p. 491.

(4) (1870) 7 Bom. H. C. R. A. C. J. 146.

(5) (1880) 5 Bom. 8.

(6) (1882) 6 Bom. 495.

1903.

HASSANBHAI

vs.
UMAJI.

1903.

HASSANBHAI

v.
UMAJI.

The case of *Shivram v. Genu*⁽¹⁾ is instructive. In that case one Genu had mortgaged property to one Hanmantrao for a sum less than Rs. 100 by an unregistered deed. At a later date Genu executed a mortgage for less than Rs. 100 of the same land to one Pandu by a registered deed. Hanmantrao obtained a decree upon his mortgage and having caused the property to be put up to sale by the Civil Court became its purchaser. He did not make Pandu a party to the suit on the mortgage. Subsequently the assignee of Pandu brought a suit to enforce the mortgage to Pandu. In that case Westropp, C. J., said (at page 519): "Assuming, however, that Pandu had not, at or before the execution of his mortgage, notice of Hanmantrao's unregistered mortgage, and, therefore, that Pandu's mortgage by virtue of its registration is entitled to priority over that of Hanmantrao, the latter (Hanmantrao) will in that event be entitled, as owner of what was Genu's equity of redemption under the judicial sale to Hanmantrao, to redeem the mortgage of Pandu." What is to be specially noticed here is that Pandu was not represented in the suit in which Hanmantrao became purchaser and thus owner of what was the mortgagor Genu's interest in the equity of redemption.

The principle here followed is the same as that in the later case of *Radhabai v. Shamray*,⁽²⁾ namely, that in a suit between the prior mortgagee and the mortgagor on the prior mortgage, the mortgagor's interest in the equity of redemption is fully represented and passes under the decree for foreclosure or sale to the mortgagee or to the Court purchaser even though a puisne mortgagee who has an interest in, or charge upon, the right to redeem the property has not been made a party to such suit.

In *Umes Chunder Sircar v. Zahur Fatima*,⁽³⁾ a case decided, as already noted, by the Privy Council, a prior mortgagee who had acquired the equity of redemption of the mortgagors, charged to the extent of a subsequent mortgage, was allowed to redeem the subsequent mortgagee in a suit in which the latter sued to redeem prior encumbrances so as to make his own charges the first on the property.

(1) (1882) 6 Bom. 515.

(2) (1881) 8 Bom. 168.

(3) (1890) 18 Cal. 164.

Mr. Mulgaonkar argued that this decision may also be interpreted as supporting his contention because it decreed a preliminary redemption by the puisne mortgagee of the prior mortgage and then upon the terms stated in the decree the redemption of the puisne mortgagee by the prior mortgagee, but it is unnecessary to discuss the reasons appearing from the judgment for the decree taking this form, for the fact remains that the decree as worked out gave the prior mortgagee the option to redeem the puisne mortgagee.

In *Rangasamy Naiken v. Jelli Bodi Naiken* ⁽¹⁾ the liability of a second mortgagee to be redeemed by a first mortgagee who had got a decree for sale on his mortgage and purchased the mortgaged property is affirmed.

In *Anundo Moyee Dossee v. Dhonendro Chunder* ⁽²⁾ it was pointed out that a foreclosure suit binds subsequent mortgagees of the equity of redemption.

Mr. Mulgaonkar has relied upon the following remark in Ghose on the Law of Mortgage (3rd Ed., p. 741):—"It should be here noticed that where a mortgage is redeemed by a puisne incumbrancer who was no party to the suit for foreclosure, the mortgagor will acquire a new right of redemption which he may exercise notwithstanding the previous decree for foreclosure. Thus, if the first mortgagee forecloses the mortgage without making the second mortgagee a party to the action, the latter may redeem the first mortgage; but he will be liable in his turn to be redeemed by the mortgagor." No authority is mentioned supporting this view that in the circumstances stated a right to redeem is revived in the mortgagor who has already been foreclosed. It is a view opposed to section 60, paragraph 2, of the Transfer of Property Act (IV of 1882) and to the decisions of this Court in *Shivram v. Genu* ⁽³⁾ and *Radhabai v. Shamray* ⁽⁴⁾ and to the principle underlying the decree passed by the Privy Council in *Umes Chunder Sircar v. Zahur* ⁽⁵⁾, but may be reconciled with those decisions and with the remarks quoted from *Heath v. Pugh* (*sup.*) if the word mortgagor in the above passage is read as meaning

1903.
HASSANBHAI
v.
UMAJI.

(1) (1902) 26 Mad. 484.

(3) (1882) 6 Bom. 515.

(2) (1871) 14 Moo. I. A. 101.

(4) (1881) 8 Bom. 161.

(5) (1890) 18 Cal. 161.

1903.

HASANBHAI

v.
UMAJI.

the person who has acquired the mortgagor's interest in the equity of redemption. Even as it stands the passage does not help the respondent Umaji as it recognizes that a second mortgagee does not in the circumstances stated escape his liability to be redeemed.

Thus on principle and authority the conclusion to be drawn is that when an order absolute for foreclosure has been made in a suit between a mortgagor and a prior mortgagee, the fact that a second mortgagee was not made a party to that suit does not deprive the prior mortgagee (who has by such order absolute acquired what was the mortgagor's interest in the equity of redemption) of his right to redeem the second mortgagee ; and this right must at his option prevail ultimately even though the equities of the suit between him and the second mortgagee may require that the decree should allow the second mortgagee to exercise in the first instance his own right to redeem the first mortgage—a right which notwithstanding the foreclosure survives to the second mortgagee until he is himself redeemed by reason of his charge on the equity of redemption not having been represented in the former suit which was therefore insufficiently constituted as to parties.

The puisne mortgagee Umaji cannot be allowed to both reprobate and approbate the proceedings in the previous redemption suit (156 of 1897). If he exercise his right to redeem Hasan he will remain liable to be redeemed himself by the owner of what was the mortgagor's interest in the equity of redemption, that is, by Hasan. The only practical question which remains is whether such ultimate redemption by Hasan should be provided for by the decree in the present suit or whether the decree should only provide for the redemption by Umaji of the prior mortgage and Hasan be left to bring another suit to redeem Umaji. Umaji has sued on his own (second) mortgage and Hasan has expressed his willingness in the Lower Court to pay off the second mortgage and thus redeem Umaji. There is therefore no reason why all proper relief should not be given in the present suit.

Umaji, respondent No. 1, has not asked that in the event of its being decided that Hasan, appellant, may ultimately redeem him, our decree should provide that he (Umaji) may in the first instance redeem Hasan.

1903.

HASSANBHAI

v.
UMAJI.

The decrees of the Lower Courts must be varied by making the relief awarded conditional on the appellant Hasan, Defendant No. 2, not redeeming the plaintiff's mortgage of 26th May, 1897, within the period allowed to Umaji to redeem Hasan which we alter to six months from this date by paying to plaintiff Rs. 147-13-0 with interest on Rs. 100 at the rate stipulated in the mortgage bond from date of suit till date of payment. In default of such payment within the said six months the appellant Hasan to be absolutely debarred of all right to redeem. Costs in the Court of first instance as ordered in that Court's decree. Costs in the Lower Appellate Court each to bear his own. But respondent No. 1 to pay the costs of appellant in this Court.

JACOB, J. :—This suit was instituted by the plaintiff Umaji to recover principal and interest due on a mortgage bond executed by defendant No. 1, Chimnaji, on the 6th May, 1897, by sale of the mortgaged property. Defendant No. 2, Hasanbhai, was added, because being in possession he appeared to have an interest in the property.

Defendant No. 1 pleaded want of consideration, and asked for a decree for payment by instalments.

Defendant No. 2 claimed to have an absolute title to the land. He had been in possession as mortgagee under a prior mortgage, and defendant No. 1 having failed in pursuance of a decree for redemption brought by him in 1897 to pay the money within the prescribed time, had been foreclosed by an order absolute on 17th February, 1899.

The plaintiff was not a party to the redemption suit. At one time in the course of the hearing before us it was understood that plaintiff's mortgage was taken *pendente lite*, but it turned out that it was executed a week before the institution of the redemption suit by defendant No. 1. In the redemption suit there were others joined as co-plaintiffs, and a question was raised before the District Court as to whether Chimnaji (defendant No. 1) had a complete title at the date of his mortgage to plaintiff. An issue on this point was tried and was decided in the affirmative.

It is true, as pointed out by the Subordinate Judge in his judgment on remand, that the question whether the mortgage by Chimnaji to plaintiff carried the whole, or only a share, of the

1903.

HASANBHAI
v.
UMAJI.

equity of redemption would not have affected the plaintiff's right to redeem a prior mortgage. The fact, however (had it been a fact) that Hasanbhai (defendant No. 2) had acquired by the foreclosure the title of other co-sharers besides Chimnaji might have materially affected the question whether Hasanbhai in his turn was not entitled to redeem the plaintiff's mortgage.

Upon the pleadings the Subordinate Judge framed a second issue in general terms, as follows, *viz.*: What relief, if any, is plaintiff entitled to against defendant No. 1 and against defendant No. 2? And on this issue he held that plaintiff was entitled to redeem the property from defendants Nos. 1 and 2 on payment of Rs. 300 within two years to defendant No. 2.

This decree on appeal was confirmed with costs.

The suit as originally framed was for realisation of the mortgage debt against the mortgagor, while the decree was for redemption against the mortgagee. The prior mortgage however was not referred to in the plaint, and the question of the necessity for redeeming it arose out of the pleadings, and as no objection was taken in the Lower Courts to the change of the nature of the suit, we should not, I think, be justified in second appeal in enforcing a technical objection of this sort against the plaintiff. Point No. 5 in the first appeal does not appear to have been pressed at the hearing. The Lower Courts should however have required the plaint to be amended and the deficiency in Court fee to be made up. In the Subordinate Court Hasanbhai stood only on his claim as absolute owner. He made no offer to redeem the plaintiff's mortgage, or, in other words, to pay off the claim as presented in the plaint. The Subordinate Judge states that he had actually refused to do so, but of this there is no indication on the record. In his first appeal Hasanbhai in point No. 9 put forward that he had been ready to pay what might be found due to plaintiff, but although when the remanded issue was under trial before the Subordinate Judge a formal offer to pay off the plaintiff's claim was made, this offer was not renewed before the District Judge when finally disposing of the appeal. Under these circumstances it does not appear that as the case comes before us the appellant is entitled to any more indulgence than the plaintiff.

The question which is before us is concerned strictly with their legal rights *inter se*.

There can be no doubt upon the authorities that a puisne mortgagee, who was not made a party to a suit on a prior mortgage, does not lose his right to redeem that mortgage by sale or foreclosure in that suit.

The further question however whether the prior mortgagee who had foreclosed, or purchased under a sale in such a suit, is in his turn entitled to the option of redeeming such a puisne mortgagee is one that is not so free from doubt.

It is true that the interest of the mortgage was acquired by proceedings in a suit to which the present plaintiff was not a party, and by which he is not therefore bound, but it appears to me that it can only be for the protection of his rights, and not for their enlargement, that the puisne mortgagee under such circumstances can claim to disregard the effects of the previous litigation.

If there had been no such former suit for redemption of the prior mortgage, there can be no doubt that the plaintiff would have been liable to be redeemed by the mortgagor. Can he then be allowed to say in reply to the prior mortgagee that the foreclosure operates to extinguish the rights of the mortgagor as against him?

Mr. Mulgaonkar was not indeed prepared to go to this length. He admitted, referring to a dictum at page 742 of Ghose's Law of Mortgage, that after redeeming the prior mortgagee he might still be subject to redemption at the instance of the mortgagor.

The dictum just noticed is not supported by reference to any authority. Its acceptance would involve the reopening of the mortgagor's right to redeem the first mortgage, which had been already foreclosed as against the first mortgagee.

It involves in fact the assumption that a puisne mortgagee who was not made a party to suit on a prior mortgage is entitled for all purposes to treat that suit as a nullity, leaving his rights as against the mortgagor and the prior mortgagee individually entirely unaffected. I cannot find that this has been affirmed in any of the cases which have been cited before us, or in other cases to which I have referred.

1903.

HASSANBHAI

v.
UMAJI.

190 .

HASSANBHAI

v.

UMAJI.

On the contrary in his order of reference to the Full Bench in the case of *Debendra Narain Roy v. Ramtaran Banerjee* ⁽¹⁾, Maclean, C. J., says : " It seems to me we ought to look, not at what his (the puisne mortgagee's) rights would have been, had he been made a party to the first mortgagee's suit, but what his rights as second mortgagee are as he was not made a party," that is to say, his rights are unaffected as to his security, but the persons against whom those rights may be enforced may have been changed by the previous litigation.

If the puisne mortgagee would still be liable to be redeemed, then it is no hardship on him that he should be redeemed at the instance of the prior mortgagee, who has by foreclosure acquired the title of the mortgagor, rather than by the mortgagor himself or any other private assignee of the mortgagor's interest.

If, as held by the Calcutta Full Bench in the case just cited (I. L. R., 30 Cal., 599), the puisne mortgagee is under such circumstances entitled not only to redeem but also to bring the property to sale subject to the prior mortgage, such a right must surely involve the correlative liability to be redeemed. The right to bring the property to sale involves the right of foreclosure with which the right to redeem is always co-extensive. Whether the decision of the Calcutta Full Bench is in all points reconcilable with the decisions of the Bombay High Court laying down that the purchaser at a sale in execution of a decree on a prior mortgage stands in the place of the prior mortgagee, subject only to redemption at the hands of a puisne mortgagee who was not a party to the decree (see *Desai Lallubhai Jethabhai v. Munda Kuberda* ⁽²⁾ and the previous authorities there cited), may perhaps be open to question. It may be noted however that what was held in that suit was that the subsequent mortgagee could not *compel* the purchaser (*who was not the prior mortgagee himself*) to pay off his mortgage.

I find on referring to the paper book of the case of *Vasudev v. Narayan* ⁽³⁾ that the learned Judges who decided that appeal proceeded on the assumption that " the plaintiff having bought

(1) (1903) 30 Cal. 599 at p. 601. (2) (1895) 20 Bom. 390.

(3) (1882) P. J. p. 21.

under his own decree obtained without making defendant a party is in no better position than that of a mortgagee and cannot rely on the sale under the decree as a third party could do."

This circumstance may afford a basis for reconciling the decision in *Radhabai v. Shamrav* ⁽¹⁾ with the other Bombay decisions, as to which doubt is expressed by Sargent, C. J., in *Dadoba Arjunji v. Damodar Raghunath* ⁽²⁾. In this connection it is to be borne in mind that the foreclosure with which we are now dealing was the result of a suit for redemption brought by the mortgagor, and that it was the mortgagor (who had executed his second mortgage only a week before filing his plaint), and not the prior mortgagee, who was responsible for the omission to make the present plaintiff a party to that suit. There can probably be little doubt that the present plaintiff had notice of that suit, and that it was for the purpose of raising funds for that suit that the mortgage to him was executed. Apart however from any such means that may be available for differentiating the present suit from those above referred to, it is clear that the theory that a purchase under a decree on a mortgage has the effect of shutting out all puisne incumbrances, so as in any way to affect the rights or liabilities of persons who were not bound by that decree, has been rejected by the Judicial Committee of the Privy Council: see *Umes Chunder Sircar v. Zahur Fatima* ⁽³⁾.

This case also in my opinion affords direct support to the contention of the respondent as to his right to redeem. The suit having been brought for sale, subject to other incumbrances, it became necessary to determine the question of the plaintiff's right to redeem a certain share in the hands of Zahur in order to clear the way for an adjustment of their respective rights in the purchase money. The case however did not rest there; it was found that plaintiff having redeemed that share, was in his turn liable to be redeemed by Zahur as purchaser at a sale under a decree on her mortgage, *subject to the plaintiff's mortgage or mortgages* (the plaintiff not having been a party to that suit), in respect of another subordinate share. The necessity for providing

1903.

HASSANBHAI

v.

UMAJI.

(1) (1881) 8 Bom. 168.

(2) (1891) 16 Bom. p. 491.

(3) (1890) 18 Cal. p. 179.

1903.

HASSANBHAI
v.
UMAJI.

for such a double transaction by way of mutual redemption appears to have been due to the fact that the properties held in mortgage by each were not identical (see page 181).

I therefore concur in holding that under the circumstances of the present case the appellant is entitled to redeem on the terms stated by my learned colleague, and that the decree of the lower Court should be modified accordingly. I also concur in the order as to costs.

Decree varied.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

1903.
September 16.

SHIDLINGAPPA BIN IRAPPA AND OTHERS (ORIGINAL DEFENDANTS),
APPELLANTS, v. SHANKARAPPA BIN KARABASAPPA ITTIGI
(ORIGINAL PLAINTIFF), RESPONDENT.*

Partnership—Dissolution of partnership—Appointment of Receiver—Debt of the firm—Decree against one partner—Satisfaction of the decree by the partner—Suit by the partner against his co-partners for contribution—Court—Practice and procedure.

The plaintiff and defendants traded in partnership from 1884 to 1894. In 1894 a suit for dissolution of the partnership was instituted with the result that on the 11th June, 1897, a decree was passed appointing a Receiver with the usual directions for accounts and inquiry. In the meanwhile, J., a creditor of the partnership, sued the plaintiff and defendants for the debt due to him, but the Court passed a decree against the plaintiff alone, leaving his rights against the defendants to be settled in the accounts under the decree dated the 11th June, 1897. The plaintiff satisfied J.'s decree, which was for Rs. 5,561-5-9, by means of a *havalā* under which S. and K. paid on his account Rs. 5,400 to J. The balance Rs. 161-5-9 due under the decree was paid to J. by plaintiff himself. The plaintiff then instituted a suit to recover from the defendants their share of the decretal debt. The Subordinate Judge awarded the plaintiff's claim. On appeal,

Held, (1) that as J.'s decree had been satisfied by the plaintiff becoming liable to S. and K., he was entitled to call upon the defendants to enable him to meet their share of the liability;

(2) that it was open to any creditor of the partnership to sue the partners and obtain a decree for the recovery of his debt, but no creditor, after the appointment of a Receiver, could execute any decree, obtained after that

* First Appeal No. 35 of 1903.

appointment, to the prejudice of the other creditors of the partnership. To obtain satisfaction of his decree the creditor was bound to go to the Court which had appointed the Receiver and take its directions;

(3) that the plaintiff's right to recover the amount he claimed from the defendants depended, firstly, upon the result of the accounts as between him and the defendants as partners, directed to be taken in the decree which declared the partnership dissolved and appointed a Receiver; and, secondly, upon whether J. could, under that decree and upon the accounts consequent upon it, claim more than a rateable share of his money advanced to the partnership, as against the other creditors, if any, of the partnership.

APPEAL from the decision of R. R. Gangolli, First Class Subordinate Judge of Dhárwár.

Suit for contribution. The plaintiff and defendants traded in partnership at Gadag from 1884 to 1894. During the continuance of the partnership the firm had to borrow money from time to time from one Jivaji Doraji.

In 1894 a suit was brought for the dissolution of the partnership, and on the 11th June, 1897, a decree was passed, appointing a Receiver with the usual directions for accounts and inquiry.

In the meanwhile, Jivaji Doraji filed Suit No. 55 of 1896 against plaintiff and defendants to recover money due to him by the partnership. On the 14th August, 1897, the Subordinate Judge passed a decree against plaintiff alone. The plaintiff appealed to the District Court, but without success.

Jivaji executed the decree against plaintiff who paid its amount (Rs. 5,561-5-9) by means of a *havalu* under which two persons, Satraji Hiraji and Kesarmal, paid on his account Rs. 5,400 to Jivaji, and the balance Rs. 161-5-9 was paid in cash by the plaintiff. The plaintiff and his brother executed two promissory notes to Satraji Hiraji and Kesarmal, each for Rs. 2,700.

The plaintiff then sued the defendants to recover from them their share of the decretal debt.

The Subordinate Judge decreed the plaintiff's suit.

The defendants appealed to the High Court contending (*inter alia*) that the lower Court erred in holding that the present suit was legally maintainable notwithstanding a formal order for dissolution and winding up relating to this partnership; that the lower Court did not correctly understand the preliminary

1903,

SHIDLING-
APPA
v.
SHANKAR-
APPA.

1903.

SHIDLING-
APPA
v.
SHANKAR-
APPA.

contention of the defendants which was that the settlement of all liabilities as between the partners *inter se* must be in the proceedings in the suit for dissolution and winding up and not by a subsequent and separate suit; and that the lower Court ought to have held that the suit of Jivaji himself was bad as the same should have been brought against the Receiver who at the date of the suit was the only person entitled to represent the partnership.

Mr. Branson, with Mr. M. B. Chabul, for the appellants.

Mr. Sellur, with Mr. Shamrao Vithal, for the respondent.

CHANDAYARKAR, J. :—This was a suit for contribution instituted by the plaintiff (respondent) under the following circumstances :—

The plaintiff and the defendants traded in partnership from 1884 to 1894. In 1894 a suit for dissolution of the partnership was instituted with the result that on the 11th of June, 1897, a decree was passed, appointing a Receiver with the usual directions for accounts and inquiry. In the meantime, one Jivaji Doraji, a creditor of the partnership, sued the plaintiff and the defendants for the debt due to him, but the Court passed a decree against the plaintiff alone, leaving his rights against the defendants to be settled in the accounts under the decree of the 11th of June. The plaintiff satisfied the decree of Jiwaji, which was for Rs. 5,561-5-9, by means of a *haraba* under which two persons, Satraji Hiraji and Kesarmal, paid on his account Rs. 5,400 to Jiwaji, and the balance Rs. 161-5-9 due under the decree was paid by the plaintiff himself. The plaintiff and his brother executed to Satraji Hiraji and Kesarmal two promissory notes, each for Rs. 2,700, on the 3rd April 1898. The plaintiff now seeks to recover from the defendants their share of the decretal debt which was due to Jiwaji and which he has discharged in the manner above stated.

The Subordinate Judge, who tried this suit, has awarded the plaintiff's claim, but it is contended before us that the plaintiff cannot seek contribution for more than what he has actually paid to Jiwaji. The argument is that as the plaintiff has satisfied Jiwaji's decree to the extent of Rs. 5,400 by merely executing promissory notes for the amount to Satraji Hiraji and Kesarmal, he is not entitled to recover any portion of that amount from the

defendants in the absence of actual cash payment by him. But there is no question that Jiwaji's decree has been satisfied by the plaintiff becoming liable to Satraji and Kesarmal; he is, therefore, entitled to call upon the defendants to enable him to meet their share of the liability.

The point that has been much argued, however, is that the suit is not maintainable at all, because, it is urged for the defendants (appellants), the debt in respect of which this suit for contribution was brought related to the partnership, and the plaintiff cannot treat it as an isolated transaction, but must include it in a suit between the partners for dissolution and accounts of the partnership.

The general rule of law is, as was held in *Sadler v. Nixon*,⁽¹⁾ that one of several partners in a trade, who pays money on account of his copartners, cannot maintain an action against them for contribution on the ground that he made such payment not voluntarily but by compulsion of law, the reason of the rule being that justice cannot be done between the partners without balancing the partnership accounts and that "the partner suing is bound jointly with the other partners to contribute to that and all the other partnership debts" (per Bayley, J., in *Goddard v. Hodges*⁽²⁾). As between the parties to the present suit, however, there has been already a decree dissolving the partnership, ordering accounts to be taken and the debts of the partnership to be paid. The mutual rights and liabilities of the parties to this action for contribution must, therefore, be decided with reference to that decree. By it not only was the partnership declared dissolved and accounts directed to be taken, but a Receiver was appointed to recover outstandings, pay debts, and do all that might be necessary. By the appointment of a Receiver the Court must be taken to have aimed at equality amongst the creditors. It was open, of course, to any creditor of the partnership to sue the partners and obtain a decree for the recovery of his debt; but no creditor, after the appointment of a Receiver, could execute any decree, obtained after that appointment, to the prejudice of other creditors of the partnership. To obtain satisfaction of it he was bound to go to the Court which had appointed

1903.

SIDDHING-
APPA
v.
SHANKAR-
APPA.

(1) (1834) 5 B. & Ad. 936.

(2) (1832) 1 C. & M. 23 at p. 38.

1903.

SHIDLING-
APPA
v.
SHANKAR-
APPA.

the Receiver and take its directions. That was recognised as the law in such cases in *Kewney v. Attrill*.⁽¹⁾ In the present case Jiwaji, whose decree the plaintiff claims to have satisfied, held a decree not against all the partners but one only, *i. e.*, the present plaintiff; and the plaintiff cannot claim any right higher than that which Jiwaji could have legally claimed had he held a decree against all the partners. The plaintiff's right to contribution has not been questioned before us on the ground that Jiwaji's decree was against the plaintiff only, though the defendants were parties to the suit in which it was passed. The only question of importance that has been raised seriously is that the Subordinate Judge's decree, now given against the defendants, is bad because it ignores his previous decree in the partnership suit appointing a Receiver. The contention, we think, is sound and must be allowed. Whether and how far the accounts directed by that decree have been prosecuted and the creditors of the partnership paid does not appear clearly from the evidence in the present case, and the question was not gone into before the Subordinate Judge at the trial of this suit, though it was a material question.

As has already been stated above, Jiwaji, as a creditor of the partnership, obtained his judgment against the plaintiff alone in respect of the partnership debt after judgment had been pronounced for dissolution of the partnership and a Receiver had been appointed. The present suit falls, then, within the principle of *Kewney v. Attrill*,⁽¹⁾ where Kay, J., said that "by the appointment of a Receiver the Court aims at equality amongst the creditors." Whether Jiwaji was entitled to full satisfaction or only to a rateable payment along with other creditors is a question which could be gone into only in the proceedings under the decree whereby the Receiver was appointed. In the case cited, Mr. Justice Kay gave the judgment-creditor of the partnership there concerned a conditional charge on the moneys which were in the hands of, or might be taken possession of by, the Receiver, and he also directed that the judgment-creditor must undertake to deal with the charge according to the order of the Court. We think that whether the plaintiff be regarded as standing in the shoes of his judgment-creditor Jiwaji, or as a partner claiming contribution

(1) (1886) 34 Ch. D. 345 at p. 346.

against his copartners, he cannot claim higher rights than Jiwaji could have, according to law, claimed. In either view the plaintiff ought to have carried his claim against the defendants to the Court which had passed the decree for dissolution and accounts and obtained an order from the Court to the Receiver to treat his present claim as an incident in the taking of the accounts. Whether the accounts are still open we are not in a position to say, as the evidence is meagre, and the Subordinate Judge has not dealt with this important question. But we do not think we should prolong the present litigation by fresh inquiry in the present suit. The plaintiff's right to recover the amount he claims from the defendants depends, firstly, upon the result of the accounts as between him and the defendants as partners, directed to be taken in the decree which declared the partnership dissolved and appointed a Receiver; and, secondly, upon whether Jiwaji could under that decree and upon the accounts consequent upon it claim more than a rateable share of his money advanced to the partnership, as against the other creditors, if any, of the partnership. We must, therefore, amend the decree of the Subordinate Judge by declaring that the plaintiff is entitled to recover from the defendants only so much of his claim in the present suit as may be directed by the Court executing the decree in suit No. 486 of 1894.

Parties to bear their own costs throughout.

Decree amended.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

DATTARAM GOVINDBHAI GUZAR (ORIGINAL DEFENDANT No. 3),
APPELLANT, *v.* VINAYAK BALKRISHNA AGASHE AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS 1, 2, 4 AND 5), RESPONDENTS.*

1903.
September 17.

RAMCHANDRA ANANT PARCHURE AND ANOTHER (ORIGINAL DEFENDANTS 1 AND 2), APPELLANTS, *v.* VINAYAK BALKRISHNA AGASHE AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS 3, 4 AND 5), RESPONDENTS.*

Bombay Minors' Act (XX of 1864), section 18—Minor—Administrator—Sanction of the Court—Transfer of minor's interest as mortgagee in possession—

* Joint Appeals 103 and 110 of 1900.

1903.
SHIDLING-
APPA
v.
SHANKAR-
APPA.

1903.

DATTARAM
v.
VINAYAK.

"Any immoveable property"—*Transfer of Property Act (IV of 1882), section 72*—*Mortgagee in possession expending money to defend his title against mortgagor*—*Suit for account*—*Minor*—*Contract with minor void*—*Refund of money*—*Specific Relief Act (I of 1877), section 41.*

The expression "any immoveable property" in section 18 of the Bombay Minors' Act (XX of 1864) means immoveable property of any character or kind whether held by the minor as owner, or mortgagee, or in any other right. Hence, the administrator of a minor, appointed under Act XX of 1864, could not sell immoveable property held by the minor as a mortgagee in possession without the previous sanction of the Court.

A mortgagee in possession is, under section 72 of the Transfer of Property Act (IV of 1882), entitled to add to his mortgage-debt, in the absence of a contract to the contrary, sums spent by him for making his own title thereto good against the mortgagor. The mere fact that in a redemption suit the mortgagee in possession did not give details of the sums either in the course of the trial or in his written statement is not sufficient to deprive him of his right, seeing that those details can be gone into after the redemption decree providing for an account has been passed.

The decision in *Mohori Bibee v. Dharmodas Ghose* ⁽¹⁾ is to the effect that a contract by a minor, such as a mortgage, is void and that a money-lender who has advanced money to a minor on the security of the mortgage is not entitled to repayment of the money on a decree being made declaring the mortgage invalid. That decision, however, is also an authority for the proposition that the circumstances of a particular case may be such that having regard to section 41 of the Specific Relief Act (I of 1877), the Court may, on adjudging the cancellation of an instrument, require the party to whom such relief is granted to make any compensation to the other which justice may require.

JOINT appeals from the decision of V. V. Paranjpe, First Class Subordinate Judge at Satará.

Suit for redemption.

One Hanmantrao owned 4 annas and 6 pies share in the inám village of Keral, and two-thirds share in the inám village of Potle. He mortgaged with possession his share in these two villages, on the 22nd July, 1870, with Govindbhai (father of defendant 3) and defendant 1 for Rs. 12,000. Out of mortgage-money Rs. 8,000 were advanced by Govindbhai, and Rs. 4,000 by defendant 1.

Before this mortgage, a money-decree was passed against Hanmantrao in 1868; and in execution of it, his right, title and interest in the Keral village were sold subject to that mortgage at a

(1) (1903) 30 Cal. 539.

Court auction, and were purchased, on the 16th November, 1871, for Rs. 8 by one Naro, a clerk in the employ of Govindbhai. The sale certificate was issued to Naro on the 11th January, 1872; and shortly after this his name was substituted for the Keral village in the place of that of Hanmantrao, in the Government records. Govindbhai (father of defendant 3) died some time after the sale of the Keral village. Defendant 3 was then only eight days old; and Naro and three others were appointed the guardians and administrators of his estate, under Act XX of 1864. While this appointment was in force, the administrators, including Naro, executed, on the 3rd April, 1881, a deed in favour of defendant 1, and thereby assigned to him whatever interest Govindbhai had in the mortgage, for Rs. 5,401. On the 17th April, 1881, the administrators presented a petition to the Mamlatdár, reciting the fact of assignment and praying that the village officers be directed to make payment of land revenue to defendant 1. On the same day Naro addressed a yádi to the Assistant Collector in the form of a *rájináma*, stating that he had sold his right derived from the auction purchase in the Keral village to defendant 1 and Balkrishna (father of plaintiff) and praying that it be transferred from his name to theirs. The transfer of the names was duly effected.

Hanmantrao's interest in the village of Potle also passed through many hands. In 1871, Balkrishna (father of plaintiff) obtained a money-decree for Rs. 2,044 against Hanmantrao, and in satisfaction of it caused his interest in the village of Potle to be sold. It was purchased on the 18th and 19th November, 1872, for Rs. 1,138 by one Govind Narhar, a clerk of Balkrishna. Sale certificates were issued in the name of Govind; and on the strength thereof his name was registered for the Potle village in place of Hanmantrao's. In 1878, Govind's name was, on his own application, removed and those of Balkrishna and defendant 1 were substituted in its place. Thus half the ownership of the equity of redemption in the village of Potle remained with Balkrishna and on his death passed to his sons (plaintiff and defendant 4) and his nephew (defendant 5).

In 1884, during Balkrishna's life-time, a further mutation of names in respect of the Potle village took place: the names of Balkrishna and defendant 1 were removed and that of Ramchandra (defendant 2), son of defendant 1, was substituted. It was

1908.

DATTARAM

v.

VINAYAK.

1903.

DATTARAM
v.
VINAYAK.

found that these mutation proceedings were all sham and they did not in any way affect Balkrishna's ownership to the half of the equity of redemption in the village of Potle.

In 1896, plaintiff brought this suit praying that "account of profits should be taken and he either singly or jointly with his co-sharers (defendants 4 and 5) be permitted to redeem and recover possession of the shares in both the villages or such portions of them as he and they may be entitled to, on payment of such sum, if any, as may be found due on the mortgage."

Defendants 1 and 2 denied the plaintiff's right to redeem.

Defendant 3 contended in addition that the alienation of his estate made by the administrators during his minority, without the sanction of the Court, was void and not binding on him; that he attained majority on the 19th December 1895; that the properties were in possession of defendant 1 at the date of the suit; that the money due to him on his share of mortgage was Rs. 19,326-0-3; that the share in the Keral village was purchased by his guardian and administrator, Naro Amrit, for the benefit of, and with the money belonging to, him (*i. e.*, defendant 3), and that Naro did not assign, nor was he competent to assign, the right acquired by that purchase, without the leave of the Court.

The Subordinate Judge held that the assignment of the mortgage rights of defendant 3 to defendant 1 was proved, and that the plaintiff was entitled to ask for account and redemption. He also held that "Court's sanction (to the alienation by Naro) was not necessary, firstly, because the surrender of the mortgage to Antaji (defendant 1), so far as defendant No. 3's interest was concerned, was virtually one in the course of redemption, Antaji having acquired the right to redeem the mortgage, and, secondly, because that interest was not of the nature of 'immoveable property' within the meaning of section 18 of Act XX of 1864."

Defendant 3, and also defendants 1 and 2, appealed to the High Court.

APPEAL No. 103 OF 1900.

Donald, with *M. W. Bhat*, for the appellant.

Branson, with *M. B. Chaulal* and *G. N. Nadkarni*, for respondents 2 and 3.

M. R. Bodas for respondent 4.

Setlur, with *V. V. Ranade*, for respondent 5.

APPEAL No. 110 OF 1900.-

Branson, with *M. B. Chaubal* and *G. N. Nadkarni*, for the appellants.

S. R. Bakhle for respondent 1.

Donald, with *M. V. Bhat*, for respondent 2.

M. R. Bodas for respondent 3.

V. V. Ranade for respondent 4.

CHANDAVARKAR, J.:—The first question in these appeals, which have been heard together as arising out of one suit, relates to the assignment of defendant No. 3's share and interest as a co-mortgagee in the property in dispute in favour of defendant No. 1, by the guardians of defendant No. 3, acting as the administrators of his property under Act XX of 1864. The property was held by defendant No. 1 and defendant No. 3 under a usufructuary mortgage from Hanmantrao, under whom the plaintiff claims, and the assignment to defendant No. 3 is impugned before us, as it was impugned in the lower Court, as void, on the ground that it was a sale of immoveable property which, according to section 18 of Bombay Act XX of 1864, the administrators of the property of defendant No. 3 had no power to effect "without the sanction of the Civil Court previously obtained." The Subordinate Judge, First Class, has held the assignment to be good, because, in his opinion, it was not an assignment of "immoveable property" within the meaning of section 18 of the Act and the assignment was "virtually one in the course of redemption, *Antaji, i.e.*, defendant No. 1, having acquired the right to redeem the mortgage."

As to the first of these reasons assigned by the Subordinate Judge, it is to be remarked that whatever may be the nature of the interest of a mortgagee in immoveable property mortgaged to him, whether such interest ranks as real or personal estate, the terms of the last part of section 18 of Act XX of 1864 which bears on the question now under discussion apply to "any immoveable property," which, properly construed, means immove-

1903.

DATTARAM
v.
VINAYAK.

1908.

DATTARAM

v.

VINAYAK.

able property of any character or kind, whether held by the minor as owner, or mortgagee, or in any other right. It is unquestioned in the present case that the property in dispute, consisting of certain shares in two Inám villages, is immoveable property; what is contended for defendant No. 1 is that the interest of defendant 3 in it as a mortgagee in possession was transferred to defendant No. 1. But section 18 of Bombay Act XX of 1864 does not refer to a minor's interest in immoveable property. Assuming such interest is moveable property, the prohibition in section 18 is to a sale, alienation, mortgage or otherwise of "any immoveable property" apart from the question of the nature or extent of the minor's right or interest. The meaning is clear that the moment it is ascertained that a minor has some right to or interest in immoveable property, his administrator cannot sell it so far as that right or interest goes without the previous sanction of the Court. This construction is supported by section 11 which provides that the Court may direct the Collector to take charge of a minor's estate when that estate consists "in whole or in part of land or any interest in land." This shows that the Legislature intended to treat "any interest in land" as of the same class as the land itself. Under section 16 a minor's administrator is bound to deliver in Court within six months from the date of his certificate "an inventory of all the immoveable property belonging to the minor, and of all such sums of money, goods, effects, and things as he shall have received on account of the estate, together with a statement of all debts due by or to the same." Where a minor is in possession of property mortgaged to him as a usufructuary mortgagee, it cannot be disputed that the property itself *belongs* to him as such mortgagee and that under section 16 of the Act the minor's administrator is bound to deliver in Court an inventory of it. Upon a proper construction of the Act itself, then, we come to the conclusion that the administrator of a minor, appointed under it, could not sell immoveable property held by the minor as a mortgagee in possession without the previous sanction of the Court, and that the transfer to defendant No. 3, evidenced by Exhibit No. 231, must be treated as void. The Subordinate Judge has, however, treated the transaction as one of redemption by defendant No. 1 of the mortgage so far as defendant No. 3's interest as his co-mortgagee was concerned, and he bases that conclusion of his on the

1903.

DATTARAM
v.
VINAYAK.

ground that since at the date of the transaction defendant No. 1 had become a part owner of the equity of redemption he was entitled to redeem the whole of the property. But the question whether the transaction was an assignment to defendant No. 1 of defendant No. 3's rights as a mortgagee, or a redemption of the latter by the former, cannot be determined simply with regard to the rights which defendant No. 1 had at the time. The question is not whether he had the right to redeem defendant No. 3, but whether he intended to exercise and did exercise that right. The answer to that must depend upon the construction of Exhibit 231 and the surrounding circumstances. By Exhibit 231 the administrators purported to *sell* to defendant No. 1 the right and interest of defendant No. 3 in the deed of mortgage and in the property. Defendant No. 1 is described in the deed as a joint mortgagee who by the sale to him was to stand in the place of the vendors "as regards ownership of the document, &c." There is no reference whatever in the deed to the share acquired by defendant 1 in the equity of redemption. We must, therefore, hold that the transaction evidenced by Exhibit 231 was a sale and not one of redemption.

This conclusion renders it unnecessary for us to consider the other point urged before us in defendant No. 3's appeal, *viz.*, that the sale under Exhibit 231 was vitiated by the fact that defendant 1 held at its date a fiduciary relation towards defendant No. 3.

The next point is that arising on the appeal of defendant No. 1, deceased, by his heirs. That point is that the Subordinate Judge has wrongly rejected their claim to bring into the mortgage account sums which they allege were spent by defendant No. 1 for the protection and preservation of the property. The ground on which the Subordinate Judge has declined to allow the sums is that defendants Nos. 1 and 2 made no such claim in their written statements and did not file a detailed statement of the items on this head "to enable the plaintiff and his co-sharers to give a proper reply to the same," though more than once they had been directed to file such statement. Section 92 of the Transfer of Property Act provides that where an account of what is due on a mortgage has to be taken in a redemption suit

1902.

DATTARAM

v.

VINAYAK.

“the Court shall pass a decree ordering that an account be taken of what will be due to the defendant for the mortgage money and for his costs of the suit (if any) awarded to him.” The Court had the power to order an account to be taken in the present case if the circumstances showed that an account was necessary. The Subordinate Judge ought to have allowed defendants 1 and 2 to prove facts entitling them to credit in the mortgage account for sums alleged to have been spent for the protection or preservation of their property and defending their title as mortgagees. Their substantial allegation was that obstructions had been caused by the original mortgagor, Hanmantrao, and by others at his instigation to the peaceable enjoyment of the mortgaged properties and that Antaji, defendant No. 1, had to spend large sums for the removal of those obstructions. The Subordinate Judge has in another connection allowed defendants 1 and 2 to give evidence on the question of these obstructions and their removal and he has found them proved. That finding has not been contested before us on the merits by any of the respondents in this appeal, and on the evidence we think it is correct. The only question that was argued as against that finding was that defendants 1 and 2 as mortgagees had no right to hold the mortgaged property chargeable with expenses incurred by defendant 1 in defending his title as a mortgagee as against Hanmantrao, the original mortgagor, who had lost his right to the property at the date of the obstructions raised by him. Under section 72 of the Transfer of Property Act a mortgagee in possession is entitled to add, in the absence of a contract to the contrary, sums spent by him for making his own title thereto good against the mortgagor. Upon the finding of the Subordinate Judge it follows that defendant No. 1 spent certain sums in defending his title against the original mortgagor, Hanmantrao. The mere fact that defendant No. 1 did not give details of the sums either in the course of the trial or in his written statement is not sufficient to deprive him of his right, seeing that those details can be gone into after the redemption decree providing for an account has been passed. In *Ex parte Carr, In re Hofmann*⁽¹⁾ it was said :—“A mortgagee

(1) (1879) 11 Ch. D. 62 at p. 66.

1903.

DALTARAM
v.
VINAYAK.

is entitled to deduct from the value of his security that which is in the nature of salvage money, his reasonable expenses of defending his title." In that case Cotton, L. J., said:—"A mortgagee has a right to assume his mortgagor's representation of his title to be true and to take any reasonable proceedings for defending his title and asserting the validity of his security."⁽¹⁾ We think that defendants 1 and 2 are therefore entitled to bring into the mortgage account the sums which they may prove were reasonably spent in defending their title and asserting the validity of the mortgage. An account must be taken of those sums in the execution proceedings.

There is a further claim which is urged before us by the learned counsel for defendants 1 and 2 and it arises out of our finding that the assignment under Exhibit 231 of defendant No. 3's rights as a co-mortgagee to defendant No. 1 by the administrators of the property of defendant No. 3, appointed under Act XX of 1864, is void. It is contended that under those circumstances the amount of Rs. 5,475 paid by defendant No. 1 to defendant No. 3 as consideration for the assignment should be brought into the account which will have to be taken in adjusting the mutual rights and liabilities of the parties arising out of the mortgage now in dispute. On the other hand, Mr. Donald, counsel for defendant No. 3, argues that defendant No. 1 is not entitled to recover back the sum of Rs. 5,475, and he relies on the recent ruling of the Privy Council in *Mohori Bibee v. Dharmodas Ghose*⁽²⁾ where it has been held that a contract by a minor, such as a mortgage, is void and that a money-lender who has advanced money to a minor on the security of the mortgage is not entitled to repayment of the money on a decree being made declaring the mortgage invalid.

If the facts of the case with which we have to deal were simply these, that defendant No. 3's administrators had, during his minority, sold his rights as mortgagee in the properties in dispute, to defendant No. 1 for Rs. 5,475, without the sanction of the Court as required by Act XX of 1864 and that the administrators had received the money from defendant No. 1 for defendant No. 3,

(1) (1879) 11 Ch. D. 62 at p. 67.

(2) (1903) 30 Cal., 539; 5 Bom. L. R., 421.

1903.

DATTARAM
v.
VINAYAK.

the principle of the ruling just cited would have applied, that principle being that "A Court of Equity cannot say that it is equitable to compel a person to pay any moneys in respect of a transaction which as against that person the Legislature has declared to be void." But the decision in question of the Privy Council is also an authority for the proposition that the circumstances of a particular case may be such that, having regard to section 41 of the Specific Relief Act, the Court may, on adjudging the cancellation of an instrument, require the party to whom such relief is granted to make any compensation to the other which justice may require. Upon the facts of the case in *Mohoree Bibee v. Dharmodas Ghose*⁽¹⁾ the Calcutta High Court had held that there were no circumstances which required the Court to order the return by the infant to the mortgagee of money advanced to the former and the Privy Council saw no reason for interfering with the discretion so exercised. We must, therefore, in the present case, ascertain the facts and then determine the principle of law applicable to them.

Defendants 1 and 3 were at first co-mortgagees who held possession of the mortgaged properties with a liability to account to the mortgagor and further with a liability *inter se* to account to each other for the rents and profits received respectively by them, this latter liability arising out of the fact that defendant 1 held possession of some and defendant 3 held possession of the other properties. In 1878 defendant 1 obtained a half share in the equity of redemption of one of the properties, *viz.*, the Inám village of Potle, and subsequently defendant No. 3 became the sole owner of the equity of redemption in the other property, *viz.*, the Inám village of Keral. In this state of things, while the parties were accountable to each other for the profits received by each, the administrators of the property of defendant No. 3, who was then a minor, sold without the sanction of the Court in 1881 his right, title and interest as a mortgagee in the mortgaged estates to defendant No. 1. They sold it without the sanction under the mistaken view of law that defendant No. 3's right was moveable property—a mistake which, the facts of the case warrant our holding, was shared in by defendant No. 1 also.

(1) (1903) 30 Cal. 539; 5 Bom. L. R. 421.

1903.

DATTARAM
v.
VINAYAK.

Under this mistake the transaction was completed and accordingly the purchase-money—Rs. 5,475—paid by defendant No. 1 was entered in the books of defendant No. 3 in two sums—one of Rs. 5,000 and the other of Rs. 475—and credited to the account of the mortgagor on the 12th April 1881 and 6th April 1881, respectively. Now that an account has to be taken between the plaintiff on the one hand and defendants 1 and 3 on the other, and between defendant 1 on the one hand and defendant 3 on the other, this sum of Rs. 5,475, which defendant 3 had received, as appears from his books, on the mortgage account, would have to be brought into the mortgage account because it forms a part of it, and taken by itself, as the entry stands in the accounts of defendant No. 3, it *prima facie* must be referred to the mortgage account. The only ground on which we are asked to exclude it from the account in which it stands is that these two sums were paid in respect of a transaction which is now adjudged void. But though the transaction is declared void and the money cannot be recovered on that ground, the fact stands—a fact which was absent in the case before the Privy Council—that the sums have formed part of the accounts between the parties to the mortgage. If the assignment had been valid, the account would have closed and, as a matter of fact, it was taken as closed on that footing. But now that the account has to be re-opened as a result of our finding that the assignment to defendant No. 3 is void, we cannot shut our eyes to the fact that defendant No. 3 has received Rs. 5,475 from defendant 1 on the mortgage account. No doubt it was paid to defendant No. 3 for the void assignment under the mistake of law common to both parties that the interest of a mortgagee in possession is moveable property. But, as observed in *Ex parte James, In re Condon*⁽¹⁾ “the principle that money paid under a mistake of law cannot be recovered must not be pressed too far, and there are several cases in which the Court of Chancery has held itself not bound strictly by it.” In *Rogers v. Ingham*,⁽²⁾ James, L. J., pointed out that there are cases in which the Court of Chancery in England has not adhered strictly to the rule that a mistake in law is not always incapable of being reme-

(1) (1874) L. R. 9 Ch. 609 at p. 614. (2) (1876) 3 Ch. D. 351 at p. 355.

1903.

DATTABAM

v.

VINAYAK.

died in that Court, and then he goes on to say: "Relief has never been given in the case of a simple money demand by one person against another, there being between those two persons no fiduciary relation whatever, and no equity to supervene by reason of the conduct of either of the parties." The facts in the case of *Mohori Bibee v. Dharmodas Ghose*⁽¹⁾ show that the restitution there claimed but disallowed had no other basis than that of a simple money demand—the person who had lent money to the minor on a mortgage knew the debtor was a minor, there was no fiduciary or other relation between the two to give rise to an equity in favour of the creditor, and the minor had dissipated the money in extravagance. In the present case the restitution claimed is not a mere money demand; the parties (defendants 1 and 3) stand in a state of accountability to each other; and the amount claimed by defendant 1 stands as part of the mortgage account which defendant 3 wishes to re-open. These facts raise an equity in favour of defendant No. 1 and call for the exercise of the discretion vested in the Court under section 41 of the Specific Relief Act. The leading case on the point is that of *Daniell v. Sinclair*,⁽²⁾ and the facts of the present case are sufficient to bring it within the principle laid down there. In *Daniell v. Sinclair*⁽²⁾ it was said:

"Undoubtedly there are cases in the Courts of Common law in which it has been held that money paid under a mistake of law cannot be recovered, and it has been further held that, under certain circumstances, the giving credit in account may be treated as so far equivalent to payment as to prevent sums wrongly credited being made the subject of set-off: *Skyring v. Greenwood*.⁽³⁾ But in equity the line between mistakes in law and mistakes in fact has not been so clearly and sharply drawn." In *Earl Beauchamp v. Winn*⁽⁴⁾ Lord Chelmsford observes: "With regard to the objection that the mistake (if any) was one of law, and that the rule '*ignorantia juris neminem excusat*' applies, I would observe on the peculiarity of this case that the ignorance imputable to the party was of a matter of law arising upon the doubtful construction of a grant. That is very different from the ignorance of a well-known rule of law; and there are many cases to

(1903 30 Cal. 539; 5 Bom. L. R. 421. (3) (1825) 4 B. & C. 281.
(2) (1881) 6 App. Cas. 181.

(4) (1873) L. R. 6 H. L. 225 at p. 234.

be found in which Equity, upon a mere mistake of the law, without the admixture of other circumstances, has given relief to a party who has dealt with his property under the influence of such a mistake."

"In *Cooper v. Phibbs*⁽¹⁾ Lord Westbury says: "Private right of ownership is a matter of fact: it may be also the result of matter of law; but if parties contract under a mutual mistake as to their relative and respective rights, the result is that that agreement is liable to be set aside, as having proceeded upon a common mistake."

"In *M'Carthy v. Decaix*,⁽²⁾ where a person sought to be relieved against a renunciation of a claim to property, made under a mistake respecting the validity of a marriage, the Lord Chancellor observes: "What he has done was in ignorance of law, possibly, of fact; but, in a case of this kind, this would be one and the same thing."

"In *Livesey v. Livesey*⁽³⁾ an executrix who, under a mistake in the construction of a will, had overpaid an annuitant, was permitted to deduct the amount overpaid from subsequent payments.

"Undoubtedly the signature by the plaintiff of the account in question, if it stood alone, unexplained, would afford a strong presumption that an agreement to substitute compound for simple interest under the mortgage had been come to, and it was for the purpose of proving the agreement which the defendant had pleaded that the account was relied upon. Their Lordships accept the finding of the jury that no such agreement was, in fact, made; indeed, there would seem to have been no consideration for it, because, although the defendant did not exercise his power of sale as soon as he might, there is no evidence that he ever bound himself or promised to show any forbearance or indulgence to the plaintiff. Their Lordships further agree with the Courts below, that both parties may be taken to have misunderstood the effect of the mortgage-deed. This being so, there was no intention to make a change in the rate of interest—no such question was discussed or considered. The accounts were drawn

(1) (1867) L. R. 2 H. L. 149 at p. 170.

(2) (1831) 2 Russ. & My. 614.

(3) (1827) 3 Russ. 237.

1903.

DATTARAM

v.

VINAYAK.

1903.

DATTARAM

v.
VINATAK.

up and assented to by the parties under a common mistake as to their respective rights and obligations. Their Lordships are therefore of opinion that the signature of a particular account occurring in a series of accounts all alike drawn up in error, does not prevent it being re-opened upon the accounts under the mortgage being taken."⁽¹⁾ We think, therefore, that the contention of the learned counsel for defendants 2 and 3 as to Rs. 5,475 must be allowed.

The questions raised by the cross-objections filed by defendants 1 and 2 have not been pressed; Mr. Branson who appeared for these defendants having intimated to the Court that he did not intend to argue them. The cross-objections, therefore, of defendants 1 and 2 filed in appeal No. 103 of 1900 fail.

We now come to the point raised by the cross-objections of defendant No. 4. It relates to the equity of redemption in the village of Keral. The Subordinate Judge has found that the equity of redemption in question was purchased at a court-sale by one Naro on the 16th of November, 1871. Naro was at the date of the purchase a kárkún of defendant No. 3's father; and when defendant No. 3's father died, he was appointed one of the administrators of defendant No. 3's estate. In August, 1881, Naro gave in a *rajinama* under section 74 of the Bombay Land Revenue Code, relinquishing his rights in favour of defendant No. 1 and the father of the plaintiff and defendant No. 4. The case of defendant No. 4 is that by this relinquishment he and the plaintiff became co-owners of the equity of redemption with defendant No. 1. The Subordinate Judge has, however, overruled the claim, holding that Naro was merely a *benami* purchaser for defendant No. 3. We agree with the Subordinate Judge's view and think that the evidence justified his finding that Naro was a *benamidar*. It was urged before us that in any case this question should be left open and made the subject of a separate suit, but the parties having gone into the question and led evidence, we do not think we should accede to the suggestion and prolong the litigation. But it was urged by Mr. Bodas for defendant No. 4 that even supposing Naro had purchased the property as *benamidar* for defendant No. 3's father, yet defendant No. 1 and the father of

(1) (1881) 6 App. Cas. 181 at p. 190.

the plaintiff and defendant No. 4 had no notice of the *benami* title and must be taken to have purchased it *bond fide* for valuable consideration. We do not find that the plea of *bond fide* purchaser was specially pleaded in the Court below, but, apart from that, it is not available to defendant No. 4. He is the purchaser of an equitable title and defendant No. 3 had the legal right, since he and defendant No. 1 were in possession of the property as mortgagees. Even supposing that defendant No. 3 was not in possession, because the actual possession was with defendant No. 1, still by his purchase of the equity of redemption belonging to defendant 3 from Naro, who was defendant No. 3's trustee, the father of plaintiff and defendant No. 4 could not get any priority over defendant No. 3's equitable title, according to the well-known principle of law that, where equities are equal, priority prevails and the doctrine of purchaser for value without notice does not apply as between equitable estates. See per Lindley, L. J., in *Bailey v. Barnes*⁽¹⁾ and *Shropshire Union Railways and Canal Co. v. The Queen*.⁽²⁾

As to the Kothle village, we see no reason to dissent from the inference of fact drawn by the Subordinate Judge on the evidence regarding the right acquired by defendant No. 1 jointly with Balkrishna Agashe from Govind Narhar, the auction-purchaser. Nor do we see any reason to differ from the Subordinate Judge's finding as to *mahalmajkur*.

The last point urged for the plaintiff and defendants 4 and 1 is that the Subordinate Judge should have allowed them to redeem the whole of the property and left defendants 1 and 3 to sue separately for their shares as owners of part of the equity of redemption. The Subordinate Judge has given cogent reasons for his finding on this point in which we agree.

For these reasons we vary the decree of the First Class Subordinate Judge and direct—

1. Let an account be taken of what is due on the mortgage dated 22nd July, 1870 (Exhibit 280), to the mortgagees, defendants 1 and 3, at the date of this decree. The mortgagees shall be credited with the principal amount Rs. 12,000, together with interest at 9 per cent., the expenses properly incurred by defendant for the

1903.

DATTARAM

V. VINAYAK.

(1) (1894) 1 Ch. 25.

(2) (1875) L. R. 7 H. L. 496.

1903.

DATTARAM

v.

VINAYAK.

protection and preservation of the mortgaged property with interest at 9 per cent. and they shall be debited with the net income of the mortgaged property which they may have received after deducting the *mahalmajkur* expenses. The account is to be made with 'annual rests' as directed by the mortgage-deed, and the balance due at the date of this decree is to be thus ascertained. The amount thus found due should be apportioned on the two mortgaged villages, Potale and Keral, according to their market values. The plaintiff and defendants 4 and 5 or their heirs, jointly or any one or more of them, shall pay into Court a moiety of the sum falling due on the village of Potale within six months from the ascertainment of the amount and take possession of a moiety of that village from defendant 1's representative defendant 2, and defendant 3, or from either of them. Should the plaintiff or defendants 4 and 5 fail to pay into Court the sum which they are thus ordered to pay within the specified six months, liberty to apply.

2. Let an account be taken of what is due under or by virtue of the mortgage aforesaid to defendant 1 or his representative defendant 2 at the date of this decree. He is to be credited with Rs. 4,000, his portion of the principal mortgage amount, together with the expenses which he may have properly incurred for the protection and preservation of the mortgaged property, and Rs. 5,475, which he has paid to defendant 3. He is to be debited with the net income of the mortgaged property which he may have received for his share when the property was in the joint possession of defendants 1 and 3, or which he may have received while the property was in his exclusive possession. Interest to be charged on each item at 9 per cent. and annual rests should be taken. The balance represents the amount due to him on the mortgaged property.

3. Let a similar account be taken of what is due to defendant 3 on the mortgage aforesaid at the date of this decree. He is to be credited with Rs. 8,000 for his portion of the principal mortgage amount and debited with the net income of the mortgaged property which he may have received and also with Rs. 5,475, which he got from defendant 1. The account should be taken with annual rests. Interest at 9 per cent. to be charged on each

item. The balance represents the amount due to him on the mortgaged property.

4. If the balance mentioned in para. 2 of this decree exceeds the proportionate debt due on a moiety of Potle village as referred to in para. 1 of this decree, defendant 1 shall be entitled to retain his moiety of Potle village as freed from the mortgage claim, and he will be entitled, subject to the direction of the Court, to realise the excess amount due to him from defendant 3, first proceeding against the remaining moiety of Potle or the sum which the plaintiff and defendants 4 and 5 may pay into Court as directed in para. 1 of this decree and, secondly, against Keral if defendant 3's liability in respect of the proportionate debt due on Keral to defendant 1 exceeds the amount due to him, *i. e.*, defendant 3, as referred to in para. 3 of this decree, but not otherwise. If the proportionate debt due on a moiety of Potle village as referred to in para. 1 of this decree exceeds the balance mentioned in para. 2 as due to defendant 1, then the defendant 1 or his representative defendant 2 shall redeem his moiety of Potle on payment of that excess amount to defendant 3 within six months from the expiration of the six months allowed to plaintiff and defendants 4 and 5. Liberty to apply.

5. If the balance mentioned in para. 3 of this decree exceeds the proportionate debt due on Keral village as referred to in para. 1 of this decree, defendant 3 shall be entitled to get possession of that village free of any payment and he will be entitled to realise the excess amount due to him from defendant 1 by proceeding, subject to the direction of the Court, first against the moiety of Potle owned by plaintiff and, defendants 4 and 5, or the amount to be paid by them, and secondly, against the moiety of Potle owned by defendant 1 if defendant 1's liability in respect of the proportionate debt due on that moiety exceeds the amount due to him as referred to in para. 2 of this decree, but not otherwise. If the proportionate debt due on Keral exceeds the balance mentioned in para. 3 as due to defendant 3, then defendant 3 shall redeem Keral on payment of that excess amount to defendant 1 or his representative defendant 1 within six months from the expiration of the six months allowed to plaintiff and defendants 4 and 5, with liberty to apply.

1303.

DATTARAM
v.
VINAYAK.

1903.

DATTARAM

v.

VINAYAK.

6. The amount due on a moiety of Potle if paid by plaintiff and defendants 4 and 5, as directed in para. 1 of this decree, should be kept in Court and appropriated as aforesaid in the accounts hereby ordered to be taken between defendant 1 or his representative defendant 2 and defendant 3. Parties to be at liberty to apply.

7. Each party to bear his own costs of these appeals and the costs of the suit.

Decree varied.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

1903.

September 17.

SAYADKHAN PYARKHAN (PLAINTIFF) v. B. S. DAVIES (DEFENDANT).*

Civil Procedure Code (Act XIV of 1882), section 268—Decree—Execution—Salary of Railway servant—Disbursing officer outside the jurisdiction of the Court—Prohibitory order—Jurisdiction.

The judgment-debtor, a railway servant, resided within the local limits of the jurisdiction of the Small Cause Court at Bhusával, which passed the decree. The disbursing officer of the Railway Company resided at Bombay, outside its jurisdiction; but the salary was every month paid to the judgment-debtor at Bhusával by the disbursing officer, through his subordinate. The Court at Bhusával issued to the disbursing officer a prohibitory order, under section 268 of the Civil Procedure Code (Act XIV of 1882), against the salary of the judgment-debtor.

Held, that the Court at Bhusával had no jurisdiction to attach the salary of the judgment-debtor by a prohibitory order issued to the disbursing officer under section 268 of the Civil Procedure Code (Act XIV of 1882).

Abdul Gafur v. W. J. Albyn ⁽¹⁾ followed.

THIS was a reference made by V. N. Rahurkar, Subordinate Judge of Bhusával, exercising the powers of a Small Cause Court Judge, under section 617 of the Code of Civil Procedure (Act XIV of 1882).

The facts giving rise to the reference, and the opinion of the Subordinate Judge on the question referred, appear from his statement which was as follows:—

* Civil Reference No. 10 of 1903.

⁽¹⁾ (1903) 30 Cal. 713.

(1) One Sayadkhan obtained a decree in Small Causes suit No. 117 of 1903 for Rs. 131 and costs against one Mr. B. S. Davies, a guard employed at Bhusával, a railway station on the G. I. P. Railway, within the jurisdiction of the Court. On the 9th of July, 1903, he applied for the execution of the decree and prayed for the attachment of the moiety of the judgment-debtor's salary for the month of June, 1903, and of subsequent months until the satisfaction of the entire decretal debt. The judgment-debtor resided and worked for gain principally at Bhusával which is his head-quarters. He draws Rs. 100 per month. The disbursing officer of the G. I. P. Railway Company resided in Bombay. Every month the salary is paid to the judgment-debtor at Bhusával by the disbursing officer through his subordinate. A prohibitory order under section 268, Civil Procedure Code, against the salary of the judgment-debtor was sent to the disbursing officer in Bombay. It was received by him on the 3rd of August, 1903, after the salary for the month of June was paid to the judgment-debtor. The salary for the month of July was then due on the 1st of August, but was not paid to the judgment-debtor. The prohibitory order was returned by the disbursing officer on the ground that the Court had no jurisdiction to pass the order and that the machinery of section 223, Civil Procedure Code, should have been adopted.

(2) The point on which doubt is entertained :

"A railway servant resides, works for gain and receives his salary within the local jurisdiction of the Court that passed the decree. The disbursing officer holds his office beyond the local jurisdiction of that Court. Can the Court attach the salary that fell due and that was to fall due by a prohibitory order, under section 268, issued to the disbursing officer ?"

(3) My opinion on the said point is in the affirmative.

(4) Reasons for the opinion.

The Court passing the decree can attach the salary by a prohibitory order under section 268, Civil Procedure Code, if the salary is within the jurisdiction of the Court. A salary is within the jurisdiction of the Court when it is payable within its jurisdiction. In the absence of any evidence to the contrary, the salary of a railway servant is payable at the head-quarters,

1903.

SAYADKHAH

B. S. DAVIES.

1903.

SAYADKHAN
v.
B. S. DAVIES.

where he principally resides and works for gain, and not at the place of the office of the disbursing officer. There is no ruling of the Bombay High Court on the point under consideration. The facts in *Rango Jairam v. Balkrishna Vithal* ⁽¹⁾ and in *Parbati Charan v. Panchanand* ⁽²⁾ were different. In these cases the judgment-debtor and disbursing officer resided beyond the local jurisdiction of the Court. The Calcutta case of *Abdul Gafur v. W. J. Albyn* ⁽³⁾ is almost on all fours with the case under consideration. I say almost because the prohibitory order in that case was served through the Small Cause Court, Calcutta, within whose jurisdiction the disbursing officer resided. The ruling in this case is against the opinion expressed by me. The principle of the ruling is that the salary becomes due to the servant, month by month, at the place where the disbursing officer has his office (*vile* page 716 *idem*). With all due deference to their Lordships I am humbly of opinion that the salary becomes payable at the place where the servant resides and works for gain. The disbursing officer may hold his office at any place according to the convenience of the Railway administration. The servant is not required to go to the office of the disbursing officer to receive his pay, but the disbursing officer through his deputy goes to the place where the salary is payable. Having regard to this recent Calcutta decision I entertain doubt as regards the correctness of my opinion. The question is of general importance and of frequent occurrence in this Court. The decree under execution is a decree passed by me as a Small Cause Court Judge and is final. I therefore think it necessary to refer, under section 617, Civil Procedure Code, the above mentioned point to the Honourable High Court for its decision.

J. R. Gharpure (*amicus curiæ*) for the plaintiff.

B. N. Bhajekar (*amicus curiæ*) for the defendant.

CHANDAVARKAR, J.:—Following the decision in *Abdul Gafur v. W. J. Albyn* ⁽¹⁾ the question referred must, we think, be answered in the negative.

Answer accordingly.

(1) (1887) 12 Bom. 44.

(2) (1884) 6 All. 243.

(3) (1903) 30 Cal. 713.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Jacob.

NARAYAN BIN BABAJI (ORIGINAL DEFENDANT 7), APPELLANT, v. NATHAJI DURGAJI MARWADI AND OTHERS (ORIGINAL PLAINTIFF, DEFENDANTS 1—6 AND 8—10), RESPONDENTS.* 1908. *September 21*

RAJARAM BIN NAMDEV, DECEASED PENDING SECOND APPEAL, BY HIS WIDOW SONUBAI (ORIGINAL DEFENDANT 2), APPELLANT, v. NATHAJI DURGAJI AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS 1 AND 3—10), RESPONDENTS.†

Prior purchaser or incumbrancer—Priority not a right but an equity—Circumstances of each case—Partition suit—Account of past transactions—Death of a coparcener pending appeal by him—Representation by the coparcener's widow in and for purposes of appeal.

The principle laid down in *Pandurang v. Bhaskar*⁽¹⁾ and *Udaram v. Ranu*⁽²⁾ has settled the law governing decrees for partition. Prior purchasers or incumbrancers are, as far as possible, entitled to priority but not as a matter of right. It is only an equity, and the question how and where the equity should be invoked in aid of a party must depend upon equitable considerations which, again, must depend on the circumstances of each case.

In a partition suit no coparcener has any right to an account of past transactions.

A coparcener (who claimed the whole of the property in suit but who was only allowed a share in that property by the Lower Courts) having died pending second appeal by him, his widow was allowed to represent him in and for the purposes of the second appeal notwithstanding the application of the coparceners of the deceased that they were entitled to his share.

SECOND appeals from the decision of R. Knight, District Judge of Sátára, modifying the decree of N. V. Samant, Subordinate Judge of Rahimatpur.

Suit by a purchaser from an undivided coparcener in a joint Hindu family to recover by partition the share of his vendor in the family property with mesne profits.

The facts material for the purpose of this report were as follows :—

One Jayram had two sons, Parshuram and Sitaram. Parshuram had a son, Nathaji, who left two sons, Dattu and Dnyanu. Sitaram died leaving behind him three sons, Vaghappa, Narayan

* Second Appeal No. 581 of 1900.

(1) (1874) 11 Bom. H. C. R. 72.

† Second Appeal No. 582 of 1900.

(2) (1875) 11 Bom. H. C. R. 76.

1903.

NARAYAN

BIN

BABAJI

v.

NATHAJI

DURGAJI.

and Namdev. Vaghappa had three sons, Anant, Naru and Sakharam. Narayan left no issue. Namdev having died childless, his widow, Radhabai, adopted a son, Rajaram. Naru died leaving a minor son, Jagu. Rajaram died a minor on the 24th October, 1901, leaving him surviving his mother, Radhabai, and widow, Sonubai. Radhabai died the next day, that is, on the 25th October, 1901. The family was joint. Sitaram's two sons, Vaghappa and Narayan, owing to vicious habits, squandered away a considerable portion of the moveable property belonging to the family and alienated some immoveable property by executing mortgage and sale-deeds to their creditors. Sitaram, therefore, bequeathed the family property to his third son, Namdev, under a will.

In the year 1894, one Nathaji Durgaji, a creditor and vendee of Vaghappa, filed a suit against Vaghappa, the other members of the family and the alienees of Vaghappa and Narayan, to recover possession by partition of Vaghappa's share in the ancestral family property, which included, *inter alia*, Survey No. 96, which the plaintiff claimed as purchaser from Vaghappa.

Defendant 1, Vaghappa, stated that he was living separate from the family for several years, that he and his brother Narayan having misappropriated some portion of the joint moveable property, they were both turned out of the family house by their father, Sitaram, who gave all the property to Namdev under a will.

Defendant 2, Rajaram, the adopted son of Namdev deceased, answered, *inter alia*, that after Vaghappa and Narayan began to live separate from the family, his grandfather, Sitaram, gave all the property in dispute, which was his self-acquisition, to his adoptive father, Namdev, by a will; that the sale-deed of Survey No. 96, on which the plaintiff relied, was collusive, unauthorized and without consideration; that defendant 1 having misappropriated property exceeding the value of his share, he was no more entitled to a further share in the residue of the property; that defendant 1 never had the *vahivat* of the property in dispute, and that as he was turned out of the house for his bad character a long time ago, the claim was time-barred.

Defendants 3 and 4, Dattu and Dnyanu, sons of Nathaji, contended that the plaintiff's sale-deed was colourable and invalid; that while they were minors, Sitaram, the father of defendants

1 and 2, being the manager of the family, out of selfishness gave to his sons, defendants 1 and 2, moveable property worth about seventy or seventy-five thousand rupees and that the same should be brought into hotch-pot as they had a half share in it.

Defendant 5, Ramchandra Budharam Marwadi, stated that under darkhást No. 471 of 1892 he bought the new western house in dispute as the property of defendant 1; that he had sold one-half of his right therein to the plaintiff, and that the other half, which still vested in him, should be allotted to him.

Defendant 6, Kiratmal Manmal Marwadi (deceased by his assignees Velaji Nemchand and Manaji Khubchand) answered that the house near Kásar Chávdí was sold in execution of a decree against defendant 1 and his son Anant and was purchased by one Nathaji Krishnaji, who sold his rights therein to him. Therefore the house should be given to him.

Defendant 7, Narayan bin Babaji, contended that the eastern house, which was in his possession, was sold by defendant 1 with the permission of the Court to one Bidoba, who ultimately sold it to him. He contended, therefore, that the property in his possession was not liable to partition.

Defendant 8, Balkrishna Ramchandra, replied that he was Narayan's mortgagee with possession of a moiety of Revision Survey No. 29 in suit, the principal amount being Rs. 400; that Rs. 198 were due by Narayan to him as a personal loan, and that for both the said transactions defendant 1 had passed to him two mortgage bonds which had not been paid.

Defendants 9 and 10, Naru and Sakharam, sons of Vaghappa, contended that plaintiff's sale-deed was collusive and invalid, being passed without consideration; that the property in dispute being ancestral, they and their brother Anant (who was not a party to the suit) had shares in it which their father, defendant 1, had no authority to convey; that defendant 1 was addicted to vice and the plaintiff and some of the defendants taking advantage of that circumstance deceived him and obtained documents from him fraudulently; that the sale-deed of defendant 7 was without consideration and that defendant 1 had been divided from the other members of the family for the last eight or nine years.

1903.

NARAYAN
BIN
BABAJI
v.
NATHAJI
DURGAJI

1903.

NARAYAN
BIN
BARAJI
vs.
NATHAJI
DURGATI.

The Subordinate Judge found that the property in suit was the ancestral property of defendants 1—4 and 9 and 10 and that defendants 2, 3 and 4 had each a one-fourth share in it, while defendants 1, 9 and 10 had together a one-fourth share; that defendant 1 did sell his whole right in Survey No. 96 to the plaintiff and that the said transaction was *bona-fide* and that the plaintiff had become entitled to a fourth share of the land; that the claim was not time-barred; that Sitaram's will, relied on by defendant 2, was proved, but it was invalid and did not pass any property to defendant 2 inasmuch as the property was joint ancestral property which Sitaram had no right to will away; that the western house in suit was sold at auction and that the entire interest of defendant 1 therein was purchased by defendant 5 who had a right to get a fourth share in it; that defendant 5 had sold a moiety of his interest in the said western house to the plaintiff, who was, therefore, entitled to get an eighth share in it; that the eastern house was sold by defendant 1 to Bidoba, who conveyed it to defendant 7; defendant 7 therefore got one-fourth share of defendant 1 in the said house as against the other coparceners and an equity to get the whole, if possible, on partition; that the house near Kásar Chávdí was sold at a Court sale and that the interests therein of defendant 1 and his son Anant were purchased by Nathaji Krishnaji and they were ultimately purchased by defendant 6, who had thereby become entitled to a fourth share in the said house; that the land of Revision Survey No. 29 was mortgaged with possession to defendant 7 for the total sum of Rs. 598; that the coparceners other than defendant 1 had a right to get their shares therein and that the mortgagee had an equity to retain the whole land, if possible, against his mortgages (Exhibits 75 and 76); that defendant 1 took away ornaments worth about Rs. 5,500 from the joint family and that the shares of defendants 9 and 10 were liable for their father's debts.

On the above findings the Subordinate Judge passed a decree in the following terms:—

I, therefore, order that the whole property described in the plaint be divided into four shares and that the plaintiff be given his share as prayed for by him in the property described by him to be particularly in dispute in this case, if that is found possible on valuing the property and giving the several defend-

1903.

NARAYAN
BIN
BABAJI
v.
NATHAJI
BURGAJI.

ants their shares in the order of the dates of their purchases as under. Defendants 3 and 4 are entitled each to receive a one-fourth share in the whole property, so also defendant 2, Rajaram, is entitled to a one-fourth share in the whole property, excepting the one-twelfth share of deceased Narayan in the land of Revision Survey No. 29, which has survived to him and which is subject to the mortgage charge of Exhibit 74 of defendant 8. As to the one-sixth share of deceased Narayan in this land of Revision Survey No. 29 which has survived equally to defendants 1 and 2, the defendant 8 is entitled to retain it or its value in connection with his mortgage, Exhibit 74. As to the remaining one-fourth share of defendant 1 (after excluding the one-twelfth share of Narayan in Revision Survey No. 29 which has survived to him) the same be valued and, if possible, the defendant 7 be given the whole property purchased by him by Exhibit 28 or its value. Then defendant 6 be given, if possible, his one-fourth share in the property sold by Exhibit 14 or the money value of the said share. Defendant 8 then be permitted to retain, if possible, the whole land of Revision Survey No. 29 as contained in Exhibits 75 and 76 or the value thereof as security against his said two mortgages. That after this defendant 5 be given his one-eighth share and the plaintiff his one-eighth, if possible, in the property sold by Exhibit 11 or the value of the said share. After this the plaintiff to get his one-fourth share of defendant 1 in the property contained in Exhibit 3 or the money value of such share. If after this any surplus is at all left the defendants 9 and 10 are each entitled to get one-fourth share in it and the balance, if any, to be given to defendant 1.

The plaintiff and defendant 2 having preferred two separate appeals, the District Judge found that the will set up by defendant 2 was inoperative, that defendant 1 was entitled to a share in the property which the will professed to devise, that defendants 2, 3 and 4 were each entitled to a fourth share in the family property, and that defendant 1 and his sons defendants 9 and 10 were together entitled to a fourth share. The Judge, however, modified the decree in the following way:—

The decretal order now becomes a matter of simplicity. The alienor in each instance (excepting that of one of the mortgagees, Narayan's) is Vaghappa; and he could alienate no more than his own interest. It must, therefore, be directed that partition of the property be effected and that one-fourth in each of the properties be allotted to defendant 3 and one-fourth to defendant 4;

that one-fourth in each property, except Survey No. 29, be allotted to defendant 2;

that one-fourth of the "new western" house be allotted to plaintiff and defendant 5 in equal shares; one-fourth of the house "near Kásar Cháydi" to defendant 6, one-fourth of the "new eastern" house and of Survey No. 96 to the plaintiff; these one-fourths representing Vaghappa's interest in each of the properties;

1308.

NARAYAN
BIN
BARAJI
vs.
NATHAJI
DURGAKA

that the remaining half of Survey No. 29 (*i.e.*, the half remaining after defendants 8 and 4 have each taken one-fourth) be equally divided between defendants 2 and 1, subject to these liens, *viz.*, the mortgage created by Narayan over one-sixth of this half, and subsequent to it, the mortgage created by Vaghappa over his own one-fourth, the mortgagee defendant 8 being entitled to retain the whole half until the satisfaction of his mortgages;

and that plaintiff do recover mesne profits as claimed in the plaint.

The Subordinate Judge's decree is thus modified. Defendant 2's appeal is dismissed with costs. Plaintiff's appeal is allowed to the extent indicated. But I see no reason to place his appellate costs on defendant 2.

Defendant 7 and defendant 2 preferred cross second appeals Nos. 581 and 582 of 1900, respectively. Pending the second appeals defendant 2 having died, his widow, Sonubai, on the one hand and Vaghappa's sons Anant, Naru, defendant 9, deceased by his minor son Jagu, and Sakharam, defendant 10, on the other, applied that they should be brought on the record of second appeal No. 582 of 1900 as the representatives of the deceased appellant. The Court (Kirtikar, J.) ordered the names of the applicants to be brought on the record as the representatives of the deceased and the question of their right to represent the deceased to be determined at the hearing of the second appeal.

Raikes (with *D. A. Khare*) for the appellant (defendant 7) in appeal No. 581 and respondent 9 in second appeal No. 582.

Setlur (with *J. R. Gharpure*) for respondent 1 (plaintiff) in appeal No. 581 and appellant in appeal No. 582:—We contend that the principle laid down in *Udaram v. Ranu*⁽¹⁾ governs the case. The rights of the different alienees should be determined with reference to the date of the partition and not with reference to the dates of the several transactions. Our contention is fortified by the observations in *Gurlingapa v. Nandapa*⁽²⁾: see also *Aiyyagari v. Aiyyagari*⁽³⁾. In determining the equity regard must be had to the legal position of parties. The vendor Vaghappa had, as a member of the joint family, a vested right in every part of the family property. Therefore when he sold or mortgaged his share of the whole property, the transferee *prima facie* got such interest as Vaghappa purported

(1) (1875) 11 Bom. H. C. R. (A. C. J.) 76.

(2) (1896) 21 Bom. 797.

(3) (1902) 25 Mad. 690.

to alienate, though not exactly determined by metes and bounds. We submit that the proper way in determining equities as between several purchasers is to give them in each property, which is the subject-matter of their respective transactions, that share to which their vendor was entitled.

S. R. Bakhle for respondent 10 (defendant 8) in second appeal No. 581.

G. K. Dandekar for Sonubai, widow of Rajaram, appellant (defendant 2) in second appeal No. 582 :—Rajaram having died after the filing of the second appeal, his widow, Sonubai, is entitled as his legal representative to represent him in appeal: *Subbaraya Mudali v. Manika Mudali*⁽¹⁾. Vaghappa squandered away a large portion of the immoveable property and ornaments worth Rs. 5,500. An account should be taken of the property misappropriated by him and it should be assigned to his share.

Gangaram B. Rele for Vaghappa's sons Anant and respondents 2 and 3 (defendants 9 and 10) in second appeal No. 582 :—There is a concurrent finding of both the Lower Courts that the property in suit was joint family property and that Rajaram alone was not entitled to it. It is a finding of fact. Though there was a decree for partition, Rajaram was not satisfied with it and he preferred an appeal and a second appeal. Pending the second appeal he died. The decree for partition was therefore *sub judice* and had not become final. The decree had not effected severance of Rajaram's share which consequently lapsed to his surviving coparceners. His widow, Sonubai, is, therefore, not entitled to succeed to his share. We are his undivided coparceners and, as such, entitled to inherit his share. Sonubai as Hindu widow in an undivided family is only entitled to maintenance. She therefore cannot represent her deceased husband. Our names should be brought on the record as appellants in the appeal in lieu of the deceased Rajaram and his share should be distributed amongst us: *Sakharam Mahadev v. Hari Krishna*⁽²⁾.

CHANDAVARKAR, J. :—The District Judge has modified the decree of the Subordinate Judge, without due regard to the principle laid down in the decisions of this Court in *Pandurang*

1903.

NARAYAN
BIN
BARAJI
v.
NATHAJI
BURGAJI.

(1) (1896) 19 Mad. 345.

(2) (1881) 6 Bom. 113.

1903.

NARAYAN
BIN
BABAJI
v.
NATHAJI
DURGAJI.

v. *Bhaskar*⁽¹⁾ and *Udaram v. Ranu*⁽²⁾. That principle has been recognised in other cases and must be now taken to be the settled law governing decrees for partition. But Mr. Setlur, appearing for the plaintiff before us, contends that though, it is true, the District Judge has not paid sufficient regard to that principle, the Subordinate Judge's decree went further than its strict limits, as laid down in the decisions of this Court, warranted. The Subordinate Judge's decree has been no doubt so framed as to give, as far as possible, a sort of priority to some of the defendants over the plaintiff in the application of the principle referred to; and that is what Mr. Setlur objects to. Mr. Setlur is correct so far in his learned argument that none of the defendants, as prior purchasers or incumbrancers, can claim the application of the principle laid down in the cases cited as a matter of right. It is not a right but only an equity, and the question how and where the equity should be invoked in aid of a party must depend on equitable considerations which, again, must depend on the circumstances of each case. The Subordinate Judge must in the present case be taken to have considered that such circumstances existed. The next point urged before us is as to Rs. 5,500 alleged to have been misappropriated by Vaghappa (defendant 1); but we cannot allow it; as, if we allowed it, we should be acting contrary to the principle of law that in a partition suit no coparcener has any right to an account of past transactions.

The last point is as to the right claimed by the widow of Rajaram to the share allotted to her husband who died pending the appeal to this Court. Mr. Rele, appearing for respondents 2 and 3, contends upon the authority of *Sakharam v. Hari*⁽³⁾ that his clients are entitled to that share. We have allowed Rajaram's widow to represent him in, and for the purposes of this appeal, but it is not necessary, under the circumstances of this case, to decide whether she can claim his share. That is a point which can be tried by a separate suit: *Sitaram v. Ganpat*⁽⁴⁾.

We therefore reverse the decree of the District Judge and restore that of the Subordinate Judge. The appellants in second appeal No. 582 of 1900 (represented by Mr. Dandekar) should

(1) (1874) 11 Bom. H. C. R. (A. C. J.) 72.

(3) (1881) 6 Bom. 113.

(2) (1875) 11 Bom. H. C. R. (A. C. J.) 76.

(4) (1892) P. J. p. 261.

pay the costs of the respondents in that appeal. As to the other appeal, costs in this and the Lower Appellate Court should come out of the estate, separate sets of costs being allowed to the defendant alienees and the plaintiff.

Decree reversed.

1903.
NARAYAN
BIN
BARAJI
v.
NATHAJI
DURGAJI.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.B., Chief Justice, and Mr. Justice Aston.

CHUDASAMA SURSANGJI JALAMSANGJI AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, v PARTAPSAK KHENGARJI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1903.
September 29.

Civil Procedure Code (Act XIV of 1882), section 30—Gujarāt Talukdārs' Act (Bom. Act VI of 1888), section 12⁽¹⁾—Representative order—Partition suit—"Known co-sharers"—All persons interested, parties.

It is a general rule that all persons interested ought to be made parties to a suit, howsoever numerous they may be, so that the Court may be enabled to do complete justice by deciding upon and settling the rights of all persons interested and that the orders of the Court may be safely executed by those who are compelled to obey them and future litigations may be prevented. This rule, no doubt, yields to the exigencies of particular cases and there are well established qualifications to it, such as the power of the Court under section 30 of the Civil Procedure Code (Act XIV of 1882) to make a representative order.

The phrase 'known co-sharers' in section 12 of the Gujarāt Talukdārs' Act (Bom. Act VI of 1888) covers all persons who are known to have an interest in the property and is not limited to those co-sharers whose names are recorded under the Act.

* Second Appeal No. 480 of 1900.

(1) Section 12 of the Gujarāt Talukdārs' Act (Bom. Act VI of 1888).

12. (1) The Talukdāri Settlement-Officer, or other officer aforesaid, on receiving an application for partition, shall, if the application be not open to objection on the face of it, publish a notification of the same in the office of the Mānlatdār of the taluka and at some conspicuous place in the village in which the estate to which the application relates is situate or in each of the villages comprised in the said estate, as the case may be.

(2) He shall also serve a notice on each of the known co-sharers who has not joined in the application, requiring any of them who objects to the partition to appear before him to state his objection either in person or by a duly authorized agent, on a day to be specified in the notice not less than thirty or more than sixty days from the date on which such notice is issued.

1908.

CHUDASAMA
SURSANGJI
v.
PARTAPSANG
KHENGARJI.

A person, who ought to be, but is not, a party to a proceeding is not ordinarily bound by any decree or order passed therein.

SECOND appeal from the decision of Lalshankar Umiashankar, Additional First Class Subordinate Judge of Ahmedabad with Appellate Powers, confirming the decree of V. M. Mehta, Subordinate Judge of Dhandhuka.

Suit for declarations and an injunction.

One Pachanji, a Chudasama Garasia, was the owner of Tálukdári estates in the villages of Kharad and Salasar in the Ahmedabad District. He had two sons, Bawaji the elder and Samatsang the younger. In the year 1889 three sharers in the branch of Bawaji and one sharer in the branch of Samatsang having brought a suit, No. 1 of 1889, for partition of the joint Tálukdári lands in the said villages against the sharers in the branch of Samatsang in the Court of the Tálukdári Settlement Officer, it was held that according to the family custom relied on by the plaintiffs, the sharers in Bawaji's branch were entitled to one share and a half and those in Samatsang's branch to one share. Thereafter the descendants in Samatsang's branch brought a suit, No. 2 of 1893, in the Court of the Tálukdári Settlement Officer and obtained a decree for division in two equal shares. The proceedings came up in second appeal to the High Court, where also it was held that the rights of the two branches were equal.

In the year 1897 the plaintiffs Chudasama Sursingji and Chudasama Umedsangji, sons of Chudasama Jalamsangji, a representative of Bawaji's branch, brought the present suit against their father (defendant 1), paternal uncle (defendant 2) and all the other members of the family (in all fifty-two defendants) for a declaration that they being descendants of the elder branch, were entitled, according to the custom obtaining among the Chudasama Garasias, to one share and a half, and those of the younger branch, to one share in the joint Tálukdári lands and that the decree in suit No. 2 of 1893 obtained by defendants 18—52 against defendants 1—17 was wrong and not binding upon them inasmuch as they, though necessary parties, were not joined therein and that the defendants colluded together and did not adduce proper evidence. The plaintiffs further prayed for an injunction restraining the defendants from executing the said decree.

Defendants 1, 2, 5—7, 10, 12, 13, 15 and 17 admitted the plaintiffs' allegations and claim.

Defendants 3, 4, 8, 9, 11, 14 and 16 admitted the plaintiffs' claim and stated that they were not parties to suit No. 2 of 1893, that the said decree was fraudulently obtained and they were not bound by it.

Defendants 18, 23, 32 and 38 contended that defendants 1, 2, 5—7, 10, 12, 13, 15, 17, 18, 22, 24, 26, 29, 32, 34, 38, 41, 43, 45, 49 and 51 had shares in the land in dispute and their shares had been determined in suit No. 2 of 1893; that the rest of the defendants had no shares because their fathers were alive; that plaintiffs' father, defendant 1, was a party to the said suit, the decree in which was ultimately confirmed by the High Court in second appeal No. 596 of 1896; that the present suit was, therefore, *res judicata*; that the plaintiffs' father and other defendants in that suit had taken a leading part in defending it, thus the allegation in the plaint that the defendants colluded together and did not adduce proper evidence was not true; that the plaintiffs lived jointly with their father, therefore they were not necessary parties to that suit; that there was no such custom in the family of the parties as was alleged in the plaint; that decree No. 1 of 1889 was collusively obtained by some of the sharers only, therefore the plaintiffs cannot take any advantage of it; that the said decree had been set aside by the Talukdāri Settlement Officer and by the High Court; and that the plaintiffs were not entitled to the shares as alleged in the plaint, and that the plaintiffs had no right to have the execution of decree No. 2 of 1893 stopped.

The defence of defendants 22, 24, 29, 34, 37, 41, 43, 45, 49 and 51 was the same as that of defendants 18, 26, 32 and 38.

Defendants 19, 20, 21, 23, 25, 27, 28, 30, 31, 33, 35, 36, 39, 40, 42, 44, 46, 47, 48, 50 and 52 contended that their fathers were alive, therefore they were wrongly joined as defendants.

The Subordinate Judge found that the plaintiffs could not, during the lifetime of their father, claim a share in the lands in dispute; that the suit was *res judicata*; that the decree in suit No. 2 of 1893 was not improperly obtained and was binding on the plaintiffs; that the claim was time-barred; that the defendants whose fathers were alive were wrongly impleaded in the suit;

1908.

CHUDASAMA
SURSANGJI
v.
PARTAPSANG
KHENGARJI.

1903.

CHUDASAMA
SUBSANGJI
v.
PARTAPSANG
KHENGARJI.

that the decree in suit No. 1 of 1889 was impliedly cancelled by the decree in suit No. 2 of 1893; that the rights of the two branches of the family were equal, and that the plaintiffs were not entitled to any relief. He, therefore, dismissed the suit.

On appeal by the plaintiffs the Lower Appellate Court confirmed the decree. After the decision in appeal, plaintiffs' father, defendant 1, died.

The plaintiffs preferred a second appeal.

Branson (with *G. S. Rao*) appeared for the appellants (plaintiffs):—We were not parties to the partition suit of 1893 and so the decision in that suit is not binding on us. The first Court has, in connection with certain documents, observed that if those documents had been before the Court in the suit of 1893, the decision in that suit would have been in accordance with our claim for a larger share. We were co-sharers with our father and, therefore, we were necessary parties to that suit.

Next we contend that our father died after the appeal in the Lower Court was decided. The state of circumstances, therefore, is now altered. Admitting that the suit was not maintainable during the lifetime of our father, still as he is now dead, the case should now be decided according to the law at present applicable to the circumstances of the case: *Rustonji v. Sheth Purshotumdas*.⁽¹⁾

Rao Bahádur V. J. Kirtikar (Government Pleader) appeared for respondents 19, 22, 25, 37, 38, 41—45 and 47—50:—The plaintiffs were not necessary parties to our suit of 1893. Their father, who was then alive, sufficiently represented them in that suit. He was a defendant and actively conducted the defence. In that suit the plaintiffs' father and uncle produced all the evidence which the plaintiffs have now brought forward. They even came up to the High Court in second appeal and also presented a petition of review. The plaintiffs were quite aware of those proceedings, and if they thought that they were necessary parties, they ought to have made an application to that effect. At that time they were not "co-sharers" within the meaning of section 12 (2) of the Gujarát Talukdars' Act as their names were not entered in the register kept under that Act.

(1) (1901) 25 Bom. 606; 3 Bom. L. R. 227.

The suit is not maintainable inasmuch as it was filed during the lifetime of the plaintiffs' father who was joint with his brother and other coparceners : *Apaji Narhar v. Ramchandra*.⁽¹⁾

Ramlatt V. Desai appeared for respondents 29, 33, 34, 36 and 40—42.

1903.

CHUDASAMA
SUKSANGJI
v.
PARTAPSANG
KHENGARJI.

JENKINS, C. J. :—The property in suit is a Tálukdári estate and the purpose of this litigation is to obtain a final decree of a Court of competent jurisdiction declaring the plaintiffs to be entitled to certain shares in that estate so as to lay the foundation for proceedings under Part III of the Gujarát Tálukdars' Act, 1888.

In 1889 an application was made for partition of the estate and a decree passed. This decree, however, was afterwards set aside as the proper parties had not been brought in, and in accordance with the order of the Tálukdári Settlement Officer fresh proceedings were commenced which ultimately resulted in a partition.

The present plaintiffs were not parties to those proceedings, and it is for that reason they bring the present suit.

Both Courts, however, have held that the suit is barred, (a) because in the lifetime of the plaintiffs' father it is not maintainable, and (b) because the plaintiffs were represented in the former proceedings by their father and are therefore bound. The first of these grounds is based on the Full Bench decision in *Apaji v. Ramchandra*.⁽¹⁾ That decision is binding on us, but even assuming for the sake of argument that during the father's lifetime it governed this case, that no longer is so now that the father is dead, for though the death occurred after the decree in the Lower Appellate Court, we can decide the case on the basis of conditions as they now exist : *Rustomji v. Sheth Purshotamdas*.⁽²⁾

The only point, therefore, for our consideration is whether the plaintiffs are barred by the former proceedings.

It is a general rule that all persons interested ought to be made parties to a suit, however numerous they may be, so that the Court may be enabled to do complete justice by deciding

(1) (1891) 16 Bom. 29.

(2) (1901) 25 Bom. 606 ; 3 Bom. L. R. 227.

1903.

CHUDASAMA
SURSANGJI
v.
PARTAPSANG
KIHENGARJI.

upon and settling the rights of all persons interested, and that the orders of the Court may be safely executed by those who are compelled to obey them and future litigations may be prevented (Mitford on Pleading, p. 190).

It is in obedience to this rule that in partition suits all known co-sharers must be before the Court: see *Pahaladh Singh v. Mussamut Luchmunbutty*⁽¹⁾; *Kali Kanta Surma v. Gouri Prosad Surma Bardeuri*⁽²⁾.

This rule no doubt yields to the exigencies of particular cases, and there are well established qualifications of it. Among them, as appropriate here, we may refer to the power of the Court under section 30 of the Civil Procedure Code to make a representative order.

What we have to consider in this case is how far this rule governs proceedings under the Tálukdári Act, and what consequences follow on a departure from it.

Now the Act has a specific provision on this point, for section 12 provides as follows:—

(1). The Tálukdári Settlement-Officer, or other officer aforesaid, on receiving an application for partition, shall, if the application be not open to objection on the face of it, publish a notification of the same in the office of the Mámlatdár of the Táluka and at some conspicuous place in the village in which the estate to which the application relates is situate or in each of the villages comprised in the said estate, as the case may be.

(2). He shall also serve a notice on each of the known co-sharers who has not joined in the application, requiring any of them who objects to the partition to appear before him to state his objection either in person or by a duly authorized agent, on a day to be specified in the notice not less than thirty or more than sixty days from the date on which such notice is issued.

This section is (in our opinion) a recognition of the general rule to which we have alluded; for it appears to us that the phrase *known co-sharers* covers all who are known to have an interest in the property and is not limited to those co-sharers whose names are recorded under the Act, as has been contended by the Government Pleader: this last contention is not in accordance with the plain and accepted meaning of the words, nor can we find any sufficient reason in the Act, or elsewhere, for reading these words with the limitation suggested: on the other hand it

(1) (1869) 12 W. R. (Civ. Rul.) 256 at p. 259.

(2) (1890) 17 Cal. 906.

appears to be an element in favour of adopting the natural meaning of the words that it leads to a result in accord with the policy of the general rule of practice that prevails in Courts of law.

It is not suggested that the plaintiffs in this case are not co-sharers in the sense we have here ascribed to the word, or that they were not known, or that they have stood by so as to be now estopped, and therefore we must now consider what is the legal consequence of their not having been served with notice; for admittedly they have not been served.

Here again we have as a guide the general rule of the ordinary Civil Courts that a person, who ought to be, but is not, a party to a proceeding is not ordinarily bound by any decree or order passed therein. So here we think the plaintiffs are not bound by the proceedings before the Tálukdári Settlement Officer.

For these reasons we think the decree of the Lower Appellate Court should be reversed and the case remanded for trial on the merits. Costs will abide the result.

Decree reversed. Case remanded.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, Mr. Justice Chandavarkar, and Mr. Justice Jacob.

BABAJIRAO GAMBHIRSING (ORIGINAL DEFENDANT), APPELLANT, v.
LAXMANDAS GURU RAGHUNATHDAS (ORIGINAL PLAINTIFF),
RESPONDENT.*

1903.
September 29.

Limitation Act (XV of 1877), schedule II, article 47—Civil Procedure Code (Act XIV of 1882), section 13, explanation II—Math—Manager—Possessory suit in Mámlatdár's Court in a personal and private capacity—Subsequent civil suit in a representative capacity—Limitation.

The defendant took the house in dispute on lease from one Raghunathdas who was the manager of a certain math. After the death of Raghunathdas his disciple, the present plaintiff, brought a possessory suit in the Mámlatdár's Court against the defendant, and the Mámlatdár on the 6th May, 1889, dismissed the suit on the ground that by not producing a succession certificate the

1903.

BABANIRAO
v.
LAXMANDAS.

plaintiff had failed to establish his title as heir to Raghunathdas. Subsequently the plaintiff, describing himself as the manager of the math, brought the present suit on the 7th February, 1900, to recover possession of the house and rent or damages for use and occupation. It was contended that the suit was time-barred under article 47, schedule II, of the Limitation Act (XV of 1877), it being not brought within three years from the date of the Mámlatdár's order :—

Held, that the suit was not time-barred under article 47, schedule II, of the Limitation Act (XV of 1877), because the first suit in the Mámlatdár's Court was brought by the plaintiff in his personal and private capacity, while the second suit was brought by him as manager and on behalf of the math.

In connection with the property of a math there are two distinct classes of suits; those in which the manager seeks to enforce his private and personal rights and those in which he seeks to vindicate the rights of the math.

A math like an idol is, in Hindu Law, a judicial persona capable of acquiring, holding and vindicating legal rights through the medium of some human agency. When the property is vested in the math, then litigation in respect of it has ordinarily to be conducted by, and in the name of, the manager, not because the legal property is vested in the manager, but because it is the established practice that the suit should be brought in that form. But a person in whose name the suit is thus brought has in relation to that suit a distinct capacity: he is therein a stranger to himself in his personal and private capacity in a Court of law.

An order in a Mámlatdár's suit does not give rise to the bar to which explanation II of section 13 of the Civil Procedure Code (Act XIV of 1882) relates.

SECOND appeal from the decision of B. C. Kennedy, District Judge of Sholápur, reversing the decree of T. R. Kotval, Subordinate Judge of Pandharpur.

Suit to recover possession of a house and rent.

One Raghunathdas, who was the head and manager of the math called "Tehetis Koti Dev" at Pandharpur, let out the house in dispute to the defendant at the annual rent of rupees twelve. The lease was renewed from year to year and the defendant continued in possession of the house as a tenant. After the death of Raghunathdas, his disciple, the present plaintiff, brought a possessory suit against the defendant in the Court of the Mámlatdár of Pandharpur. In that suit the defendant denied the plaintiff's right to recover possession, and alleged that one Bankat was entitled to the house. The Mámlatdár dismissed the suit on the 6th May, 1889, holding that as the plaintiff did not produce a certificate of a competent Court showing that he

1903.

BABAJI AO
v.
LAXMANDAS.

was the heir of Raghunathdas, when there was a rival claimant to the property left by Raghunathdas, the plaintiff was not a person who could come within the first issue under section 15, clause (b), of the Mámlatdárs' Act (Bom. Act III of 1876), and therefore he had no right to bring the suit. Subsequently, on the 30th November, 1899, the plaintiff served the defendant with a notice requiring him to vacate the house and give up possession, and on his failure to do so the plaintiff brought the present suit to recover possession of the house and rupees thirty-six on account of three years' rent. The suit was filed on the 27th February, 1900.

The defendant answered, *inter alia*, that the plaintiff was not the head and manager of the math of Tehetis Koti Dev; that Bankat was the heir of Raghunathdas and owner of the math; that the plaintiff had no right to bring the suit, and that the suit was time-barred owing to the Mámlatdár having in the possessory suit passed an order adverse to the plaintiff on the 6th May, 1889.

The Subordinate Judge found that the claim was time-barred under article 47, schedule II, of the Limitation Act (XV of 1877), on account of the proceedings in the Mámlatdár's Court in 1889, and dismissed the suit. On appeal by the plaintiff the Judge (E. M. Pratt) held that article 47 of the Limitation Act was not applicable inasmuch as the decision of the Mámlatdár was "against the plaintiff personally," while in the present suit he sued "in a representative capacity as manager of a math." The Judge, therefore, reversed the decree and remanded the suit for trial on the merits.

On the remand the Subordinate Judge dismissed the suit on the following ground:—

The Appellate Court has held the suit not time-barred under article 47 of the Limitation Act, and has sent the suit for trial on merits. I should have held myself concluded by the Appellate Court's finding had not the plaintiff in his examination on remand admitted that "I had brought suit (possessory one, Exhibit No. 12), as a representative of math not in my private capacity or right. I had brought the possessory suit as a representative and manager of math." "The leases were for math purposes." "The house in dispute was acquired by predecessors of Raghunathdas. Though the lease (Exhibit No. 23) describes the house (in question) as 'your' (Raghunathdas') private property, and in Exhibits Nos. 19 to 22, 24 to 32 'your property,' still the income was

1903.

BABAJIRAO
v.
LAXMANDAS.

appropriated to math." "Suit, Exhibit No. 12, was on Exhibit No. 32 of 8th December, 1887. Leases, Exhibits Nos. 20, 22, 23, 24, 26, 27, 31, 21 and 25 describe lessor as 'Raghunathdas Guru Manohardas Boa Bairagi Math Mahadvar.' All leases are taken by Raghunathdas in one and the same title" (*viz.*, as manager of math and not in his private capacity). The passages quoted above are from plaintiff's deposition when examined as a witness for the defendant and cross-examined for the plaintiff himself. Plaintiff did not recall in his cross-examination that his capacity in exhibit No. 12 and in present suit was the same. He does not say they were different in the two suits. I am under an impression that I am to decide the case on remand to me in the light of the whole evidence on record formerly and newly recorded. Both plaintiff and defendant take the same position that the property in suit has all along been the property of the math, and not that of Raghunathdas as a private individual. Plaintiff does not say in his examination that he was led to misunderstand his position. He never thought for a moment that he had any capacity as to this property except that of the manager of math and disciple of Raghunathdas and, as such, entitled to the property. No reason appears on record as to what may possibly have led plaintiff to mistake his position. None was suggested to me in argument. The interpretation the plaintiff puts on the leases and on his own conduct is that he filled one and the same capacity all along, *viz.*, that he was manager of the math in all the legal proceedings (Exhibits Nos. 12 and 1). On this ground I hold the suit barred under article 47 of the Limitation Act. * * * Mr. Keskar (plaintiff's pleader) does not say I have no power to go into the question of limitation on remand.

On appeal by the plaintiff the Judge being of opinion that neither the Subordinate Judge nor he himself had power to reopen the question of limitation which was determined before the suit was remanded, held that the proceedings in the Mámlatdár's Court in 1889 did not bar the present suit. He, therefore, reversed the decree and ordered plaintiff to recover from the defendant possession of the house with rupees thirty-six as damages.

The defendant preferred a second appeal which was at first heard by Jenkins, C. J., and Jacob, J., but after the arguments were finished, it was again argued before a Bench composed of Jenkins, C. J., and Chandavarkar and Jacob, JJ.

S. S. Patkar, for the appellant (defendant) :—The plaintiff took no steps to get the order of the Mámlatdár dismissing his suit set aside within three years from its date. The present suit is therefore barred under article 47, schedule II, of the Limitation Act, and section 21 of the Mámlatdárs' Act.

1908.

BABAJIRAO
v.
LAXMANDAS.

[CHANDAVARKAR, J.—Has the plaintiff based his present suit upon a lease?]

The plaint did not allege any specific lease. The plaintiff relied on general title and sued to recover possession as owner. We were sued as the tenant of Raghunathdas and the plaintiff alleged that he was the heir of Raghunathdas. After the remand by the Judge the plaintiff was examined as a witness and he stated in his deposition that he brought the present suit in the same capacity in which he had brought the suit in the Mám-lat-dár's Court. On the strength of the plaintiff's deposition after the remand, the Subordinate Judge dismissed the suit as time-barred under article 47, schedule II, of the Limitation Act.

[CHANDAVARKAR, J.—Under what section did the Mám-lat-dár dismiss the suit?]

The Mám-lat-dár dismissed the suit under section 15 (b) of the Mám-lat-dárs' Act. He was of opinion that we did not hold the property under the plaintiff but under Raghunathdas who was not represented by the plaintiff. The Mám-lat-dár, therefore, held that the plaintiff could not sue without a succession certificate.

[JENKINS, C. J.—The plaintiff in the present suit sought to recover the property for the math. Was there anything in the Mám-lat-dár's order which was adverse to the math?]

Though there was nothing in the Mám-lat-dár's order which was adverse to the math, still we submit that the plaintiff could not then sue to recover the property for himself but for the math. Even the present suit was brought by the plaintiff as the heir of Raghunathdas; that being so, article 47, schedule II, of the Limitation Act applies.

[JENKINS, C. J.—The Mám-lat-dár's order could not affect the title of the math.]

The order was directed against the plaintiff who claimed as the disciple of Raghunathdas, that is, it was directed against the person who alleged that he was the representative of the manager of the math.

We further contend that the plaintiff had no right to sue at all. The only person entitled to bring the suit was Bankat who

1903.

BABAJIRAO

P.

LAXMANDAS.

had made an application to be joined as a party, but his application was rejected by the first Court.

[JENKINS, C. J.—The first Court held that the plaintiff was the manager of the math.]

But the Judge in appeal did not quite accept that finding. What the Judge said was that the plaintiff's position was sufficiently valid to enable him to recover the math property from a mere trespasser like the defendant.

It was not necessary for the Mámlatdár to adjudicate on the question of right. Even when a suit is dismissed by the Mámlatdár for non-appearance or for lack of proof, then also in such cases a suit to set aside the Mámlatdár's order must be brought within three years under article 47, schedule II, of the Limitation Act: *Purushottam v. Chatargir* ⁽¹⁾, *Jogendra Kishore Roy v. Brojendra Kishore Roy* ⁽²⁾, *Chinto Ganesk v. Vishnu Ganesk* ⁽³⁾. Therefore, it is not necessary that the Mámlatdár's decision should be an adjudication on the title of the person suing in order that it should be a bar to a subsequent suit after three years.

[JENKINS, C. J. :—The plaintiff sued in the Mámlatdár's Court under a right with respect to which a succession certificate was necessary. But he has now sued in a capacity which has nothing to do with such a certificate. The two causes of action are distinct.]

We submit that in considering the application of article 47, schedule II, of the Limitation Act, it is not necessary to refer to the nature of the causes of action. The article is general and it makes no distinction in the causes of action. A suit must be brought within three years from the date of the Mámlatdár's order whatever may be the basis for the order.

N. M. Samarih, for the respondent (plaintiff):—We had brought the suit in the Mámlatdár's Court as the heir of Raghunathdas. We claimed the property as owner, and the defendant set up a rival claimant. The Mámlatdár, therefore,

(1) (1900) 25 Bom. 82.

(2) (1896) 23 Cal. 731.

(3) (1883) P. J. p. 131.

held that we were not entitled to get relief without the production of a succession certificate. The order of the Mámlatdár was not an order relating to the possession of the property. The order was that we had no right to sue. It left the property untouched.

1903.

BABAJIRAO
v.
LAXMANDAS.

[CHANDAVARKAR, J. :—But that order confirmed the defendant's possession.]

We submit that it did not confirm the defendant's possession with respect to the math. The order affected the plaintiff personally, but not the math : *Janabai v. Appaya*,⁽¹⁾ *Rajaram v. Ganesh Hari*,⁽²⁾ *Ramchandra v. Narsinhacharya*.⁽³⁾ The Mámlatdár's order was not in form or substance adverse to the math.

Patkar, in reply.—In our written statement we did not admit the plaintiff's title as manager of the math. Though our title had not become ripe by adverse possession when the suit was brought, it has become so now.

JENKINS, C. J. :—The plaintiff sues to recover possession of a house, and rent, or damages for use and occupation, describing himself as the manager of the math of Tehetis Koti Deva of Pandharpur. The defendant (among other things) pleads that the suit is time-barred on the ground that the plaintiff is bound by an order of the 6th of May, 1889, respecting the possession of the property made under the Bombay Mámlatdárs' Courts Act. This plea is embodied in the first issue, raised at the hearing of this suit, which is in these terms : — "Is the suit time-barred on account of the proceedings of the Mámlatdár in 1889?" On the 3rd of July, 1901, the Subordinate Judge of Pandharpur, finding on that issue in the affirmative, dismissed the suit. On appeal to the District Court this decree was reversed on the ground that this suit, as framed, was not barred by article 47 of the Limitation Act; and the reason for that decision was that in the opinion of Mr. Pratt, the District Judge, the suit in the Mámlatdár's Court was brought by the plaintiff personally, while

(1) (1898) P. J. p. 234.

(2) (1895) 21 Bom. 91.

(3) (1899) 24 Bom. 251.

1903.

BABAJIRAO
v
LAXMANDAS.

his present suit was brought by him in a representative capacity, as manager of the math. On remand the Subordinate Judge again decided that the suit was barred by article 47, holding on the strength of a statement made before him by the plaintiff, that the Mámlatdár's suit had been brought by him, not in his personal capacity, but as a representative of the math, and again he dismissed the plaintiff's suit.

On appeal Mr. Kennedy, the District Judge, reversed the Subordinate Court's decree, holding that both he and the Subordinate Judge were bound by the determination of this point by his predecessor Mr. Pratt. He accordingly awarded the plaintiff possession of the house with Rs. 36 by way of damages.

The defendant has now appealed to this Court, and his first ground of appeal is that the Lower Court erred in holding that the suit was not barred under article 47 of the Limitation Act. The material facts are that the defendant took the house on lease from one Raghunathdas (who was the head and manager of the math) for one year from the 8th of December, 1887. Some time between then and 1889 Raghunath died; and thereupon the present plaintiff brought a suit in the Court of the Mámlatdár, under section 15, clause 1, of the Mámlatdárs' Act when the issues appropriate to such a suit were raised. The suit proceeded upon the basis that the house originally belonged to Raghunathdas Guru Manchardas of Pandharpur and in the plaint it was alleged:—"At Kshetra Pandharpur, in the central part of the city, near the temple of Shri Kal Bhairav, in Mahadvar, there is a house (and) tenement belonging to my Khasgat (*i.e.* private) ownership. . . The room of 5 khans and the other room of 3 (khans) and 1 stone built khan, making in all 9 khans, and the roof of the bungalow over the Malvad, as enclosed within the four boundaries described above (that is to say) the khans and the building together with the passage as described above were in the vahivat (use and enjoyment) of my guru Raghunathdas Bava and the same has been in my vahivat as owner, since the time of his death. The same were given (to the defendant) on rent for one year; the said period having expired, possession (thereof may) be awarded to me."

From the judgment it appears to have been undisputed, that the defendant held the house on lease from Raghunath : and that the lease had determined ; at the same time it is manifest that the rights of the endowment were not even discussed.

The case was decided on the single point that by not producing a certificate the plaintiff had failed to establish *his heirship* to Raghunath ; and this reference to the necessity for a certificate makes it further clear that the scope of the enquiry was limited to the private rights of Luxmandas and did not purport to touch the rights of the math as represented by him : *Srimant Rajah Yarlagudda v. Makerla Sridevanma.*⁽¹⁾ On the other hand it is clear that in this suit the plaintiff sues as manager of the math. Now in connection with the property of a math, we have two distinct classes of suits ; those in which the manager seeks to enforce his private and personal rights, and those in which he seeks to vindicate the rights of the math. These two classes of suits are illustrated by *Gnanasambanda Pandara v. Velu Pandaram*⁽²⁾, on the one hand, and *Dattagiri v. Dattatraya*⁽³⁾ on the other ; and (in my opinion) the rights of the math cannot ordinarily be prejudiced by the result of a suit of the former class, that is to say, by one in which the private and personal rights of the manager alone are in question. This becomes clear when the legal conception of an endowment is borne in mind. A math, like an idol, is in Hindu Law a judicial persona capable of acquiring, holding and vindicating legal rights, though of necessity it can only act in relation to those rights through the medium of some human agency. When the property is vested in the math, then litigation in respect of it has ordinarily to be conducted by, and in the name of, the manager, not because the legal property is in the manager, but because it is the established practice that the suit would be brought in that form (see *Maharajee Shribessnuree Debia v. Mothooranath Acharjo*⁽⁴⁾ ; *Juggodumba Dossee v. Puddomoney Dossee*⁽⁵⁾ ; *Rupa Jagshet v. Krishnaji Govind*⁽⁶⁾ ; *Manohar v. Lakhmiram*,⁽⁷⁾ and *Kondo v. Babaji*⁽⁸⁾).

1902.

BABAJIRAO
v.
LAXMANDAS.

(1) (1897) 24 L. A. 73.

(5) (1875) 15 Beng. L. R. 318 at p. 330.

(2) (1899) 27 L. A. 69.

(6) (1884) 9 Bom. 169.

(3) (1902) 27 Bom. 363 ; 4 Bom. L. R. 743. (7) (1887) 12 Bom. 247.

(4) (1859) 13 M. I. A. 270 at p. 274.

(8) (1881) P. J. p. 387.

1903.

BABAJIRAO
v.
LAXMANDAS.

But a person in whose name a suit is thus brought has in relation to that suit a distinct capacity : he is therein a stranger to himself in his personal and private capacity in a Court of law.

The principles which govern the cognate doctrine of estoppel throw a light on this aspect of the case, of which we may usefully take advantage. In the *Duchess of Kingston's case* ⁽¹⁾ it was said "It must be observed that a verdict against a man suing in one capacity will not estop him when he sues in another distinct capacity, and, in fact is a different person." So in *Mellers v. Brown* ⁽²⁾ where the plaintiff was an administrator suing in ejectment it was said:—"But in the view we take of it, the plaintiff in that case must be considered as a stranger; and therefore the rule as to estoppel does not apply, for whether a party sues in another's right, or sues in a different right, he is, for the purposes of estoppel, to be deemed a stranger."

There is yet another illustration of the prominence given to distinction of capacity, to which I would refer: it is that furnished by the case of *Leggott v. G. N. Ry. Co.* ⁽³⁾ One Leggott had died as the result of an accident he met with at a station of the defendant Railway Company. After his death his widow as administratrix of his personal estate, for the benefit of herself and the deceased's children, sued the Company under Lord Campbell's Act. A verdict was taken by consent and judgment was signed against the defendant for £500 and costs which were paid. Then Leggott's widow as administratrix brought another action against the Company for injury to the deceased's personal estate occasioned by the expenses incurred as a result of the accident. On demurrer the question arose how far either party was estopped by the former action, and it was held there was no estoppel. The position is thus summarized by Mellor, J.:—"This being the state of things, the executor being the mere machine, and this being the form of machinery provided, by which an action can be maintained, the interest of the executor is in maintaining an action strictly within the limits of Lord Campbell's Act, and the question arises, can an admission on the record made where the right of the executor to bring the action is expressly so limited,

(1) (1776) 2 Sm. L. C. (11th Edn.) 731 at p. 759. (2) (1863) 32 L. J. Ex. 138 p. 142.

(3) (1876) 1 Q. B. D. 599.

be set up in another action brought by the executor generally in respect of the assets and estates of the deceased, so that in that action the defendants, who have submitted in the former action, are to be precluded from denying the facts alleged in the second action? I think that there is no estoppel under those circumstances; although the machinery nominally is the same, the entire object and effect of the action is totally different, and any admission made by the executor, if it were on his side or her side, would not be available in a subsequent action which was brought in respect of the general assets of the deceased.”⁽¹⁾

Quain, J., in the same case said “It is generally put in the books that the plaintiff must not be only the same person, but he must be suing in the same right.”

To return to the facts of this case it will be seen that this suit, brought for the recovery on behalf of the math of its property, has properly been so brought in the name of Laxmandas, not because the legal title is with him, but because he is the manager of the math, and so its appropriate representative for the purpose of any litigation necessary to enforce the rights of the math.

Can it be then that the rights of the math must be denied to it in the suit, because in a Mámлатdár's suit it was held that Laxmandas had not proved his own private and personal right to possession? Surely not. The rights of the math did not come into question in the former suit, the math was not so much as named by the Mámлатdár, and we would (in my opinion) be giving the Mámлатdár's order an effect never contemplated, and of which it is not reasonably susceptible, were we to hold that by it the math is now bound, or that by reason of it a suit in the name of Laxmandas cannot be brought to enforce the math's rights. Much has been made of the fact that in this suit Laxmandas has stated he brought the former suit as manager of the math; but I fail to see how this statement can have any decisive effect. It may be that this is the plaintiff's view, but it is our function as a Court, not his as a witness, to determine the true scope of the Mámлатdár's order: the doctrine of estoppel can have no place.

(1) (1876) 1 Q. B. D. 509 at p. 605.

1903.

BABAJIRAO
v.
LAXMANDAS.

The whole question resolves itself into this; in the former suit Laxmandas was held not to have established private and personal ownership in himself.

In this suit he is merely the appointed machinery whereby the rights of the math to possession are being enforced, and no order has been made respecting that possession. Apart, therefore, from the question whether it can be said that the plaintiff was bound by any order respecting possession it is apparent that the two positions are essentially distinct and in no way interdependent. I need hardly point out that an order in a Mámlat-dár's suit does not give rise to the bar to which explanation II of section 13, Civil Procedure Code, relates.

The considerations which I have applied to article 47 would be equally applicable to section 21 of the Mámlatdárs' Act.

It has been suggested that the case should go back for determination of the question whether Laxmandas is the manager of the math, but in our opinion that point has been sufficiently determined for the purposes of this suit by the Lower Courts.

For these reasons I think the decree should be confirmed with costs, and as my colleagues agree in this conclusion that will be the decree of the Court.

CHANDAVARKAR and JACOB, JJ.—We concur.

Decree confirmed.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Jacob.

1903.

September 29.

AHMEDBHAI VALAD HABIBBHAI (ORIGINAL DEFENDANTS 2 TO 6), APPELLANTS, v. FRAMJI EDULJI BAMBOAT (ORIGINAL PLAINTIFF), RESPONDENT.*

Malicious prosecution—Partner and firm—Liability of firm for torts of one partner—Indictment containing several charges whereof for some there is, and for others there is not, probable cause—Reasonable and probable cause—Circumstances of suspicion—Prosecution, commencement of.

* First Appeal No. 37 of 1903.

A malicious prosecution by the managing partner of a firm does not render the other members of the firm liable in damages, unless it is shown that the firm was in some way or other concerned in the prosecution and had instigated it.

Where a person prefers an indictment containing several charges, whereof for some there is, and for others there is not, probable cause, he becomes liable for preferring that indictment without reasonable and probable cause.

Reed v. Taylor⁽¹⁾ followed.

Mere circumstances of suspicion cannot be relied on as evidence of reasonable and probable cause as a defence to an action for malicious prosecution.

Busst v. Gibbons⁽²⁾ followed.

A prosecution commences when a complaint is made. It is not necessary, in order to maintain an action for malicious prosecution, that the charge was acted upon by the Magistrate: it is enough if the charge was made to the Magistrate with a view of inducing him to entertain it.

APPEAL from the decision of A. G. Bhawe, First Class Subordinate Judge at Sholapur.

Suit for damages for malicious prosecution.

Plaintiff was in the employ of defendants 2—6, as an Engineer and Manager of the Ahmedbhai Habibbhai Ginning and Pressing Factory at Bágalkot from November, 1894, to the 31st March, 1898.

Defendant 2 was the managing partner of the firm consisting of defendants 2—6; and he managed the factory at Bágalkot.

Plaintiff did not pull on well with defendant 2; and so after a long correspondence with his employers, he resigned his post on the 31st March, 1898. The defendants 2 to 6, thereupon appointed defendant 1 on the 13th April, 1898, to look after the management of the factory: and he continued to work under the directions of defendant 2, the managing partner.

The plaintiff on resigning his post came to Bombay and as he was not able to recover arrears of pay from defendants 2—6, he filed a suit against them to recover the arrears, in the Court of Small Causes at Bombay. On the 4th June, 1898, a decree for Rs. 575 was passed in his favour.

Meanwhile, defendant 1 acting under instructions from defendant 2, filed, on the 26th December, 1898, a complaint in the First Class Magistrate's Court at Bágalkot. The burden of the complaint was that the plaintiff had falsely entered on the debit side of the factory account book an item of Rs. 10 under date the 11th

1903.

AHMEDBHAI

v.

FRANJEE
EDULJI.

(1) (1812) 4 Taun. 618.

(2) (1861) 30 L. J. Ex. 75.

1903.

AHMEDBHAI

v.

FRAMJI

EDULJI.

June, 1897, for purchasing signary or nut coals, and that Rs. 58 out of the total amount of Rs. 168 shown as having been spent in purchasing fuel were not really so spent, and that both these sums had been fraudulently misappropriated by the plaintiff to his own use. He was also charged with having removed from Bágalkot to Bombay, with fraudulent intention of misappropriating, valves, a quantity of cotton, account books and other papers belonging to his masters. The plaintiff was called upon to answer these charges ; and the First Class Magistrate after investigation found that the facts and circumstances admitted or proved did not establish any criminal intention on the part of the plaintiff to misappropriate the disputed items, and he thought that at the most the wrongs complained of might be civilly actionable. He strongly suspected that the charge in respect of the valves was a trumped up one and that an attempt was made to support it by false and fabricated evidence. He therefore discharged the plaintiff under section 253 of the Code of Criminal Procedure (Act V of 1898), on the 3rd April, 1899.

The plaintiff then caused a warrant to be issued for the arrest of defendant 2, in execution of the decree which he (plaintiff) obtained in the Court of Small Causes at Bombay.

On the 25th November, 1899, defendant 1 again, at the instance of defendant 2, lodged a second complaint before another Magistrate, charging the plaintiff with criminal misappropriation in respect of five other items. This complaint was, on the 12th February, 1900, summarily dismissed by the Magistrate under section 203 of the Code of Criminal Procedure (Act V of 1898).

The plaintiff thereupon filed a suit against defendants 2—6 for damages on account of the two malicious prosecutions.

The Subordinate Judge found that so far as the first complaint was concerned, the plaintiff was not able to prove want of reasonable and probable cause as regards the first two counts ; but “ the charge made against the plaintiff in respect of the valves was wholly groundless and was trumped up maliciously with the view of avenging the plaintiff’s conduct in having resigned the service against the will of his employers and successively sued them for arrears of pay ; ” and “ the accusations made against the plaintiff in respect of the account books, &c., and the cotton were also

unfounded, and the defendants had no reasonable and probable cause to prefer the charge of criminal misappropriation or breach of trust in respect of either of them." As to the second complaint, the Subordinate Judge was of opinion that of the charges brought one was not proved to have been without reasonable and probable cause; but that as regards the other respecting the remaining four items, the complaint was preferred in a reckless and vindictive spirit. The Subordinate Judge therefore passed a decree in favour of the plaintiff and against all the defendants.

The defendants appealed to the High Court.

D. A. Khare, for appellants (defendants 2 to 6):—We contend that the Subordinate Judge erred in passing a decree against us. The plaintiff may have shown at the most want of reasonable and probable cause for the malicious prosecution, but he has not shown any malice in us, which is an essential ingredient to support an action for malicious prosecution. Looking at the case as one of principal and agent, here the agent (defendant 1) may have been actuated by malice; but this fact alone is not sufficient to render the principal (defendants 2 to 6) liable, unless it is proved that the principal also is actuated by malice. See *Hall v. Venkata Krishna*⁽¹⁾; *Abrath v. North Eastern Railway Company*⁽²⁾.

N. M. Samarth, for appellant No. 3 (defendant 3):—We are joined in this suit simply because we are partners. There is no allegation much less proof of any malice on our part. It is a well established doctrine that where one partner maliciously prosecutes a person, such person has no cause of action against the other partners unless such partners are privy to the action. See *Arbuckle v. Taylor*⁽³⁾; and *Lindley on Partnership*, pp. 149, 150.

H. C. Coyaji, for the respondent (plaintiff):—We contend that the appellants are all liable for the malicious prosecution instituted by their agent (defendant 1) at the instance of their managing partner since even corporations are held liable for malicious prosecution by their agents. See *Addison on Torts*, p. 231 (3rd Edition); *Pollock on Torts*, p. 309 (6th Edition).

⁽¹⁾ (1889) 13 Mad. 394.

⁽²⁾ (1883) 11 Q. B. D. 440.

⁽³⁾ (1815) 3 Dow. 160.

1903.

AHMEDBHAI

FRANJEE
EDULJI.

1903.

AHMEDBHAI

v.
FRAMJI
EDULJI.

We next contend that the charges preferred against us in the two complaints are such that an action for malicious prosecution will lie. It is not necessary that the charge should have been taken down in writing and acted upon by the Magistrate. It must be shown that it was made to the Magistrate with a view to induce him to entertain it as a charge of felony. See *Clarke v. Postan*⁽¹⁾ and *Quartz Hill Gold Mining Co. v. Eyre*². And what amounts to a false charge has been considered in *Ashroff Ali v. The Empress*⁽³⁾; *Empress v. Salik Roy*⁽⁴⁾, and *Ramasami v. Queen-Empress*⁽⁵⁾.

Again the wilful torts of a partner render even his co-partners liable for it. See *Hamlyn v. John Houston & Co.*⁽⁶⁾.

The question whether the want of reasonable and probable cause is established is one for the Courts to decide. It is a sort of negative proof and very slight evidence is necessary: see *Cotton v. James*⁽⁷⁾.

Lastly, where some charges are made before a Magistrate, for some of which there is, while for others there is not, a reasonable and probable cause an action for malicious prosecution will lie: *Reed v. Taylor*⁽⁸⁾.

CHANDAVARKAR, J.:—The Subordinate Judge has held defendants 2 to 6 liable in this action for malicious prosecution solely on the ground that they are “partners in the Bágalkot Press and Ginning Factory in which the plaintiff was employed by them as Engineer and Manager, and that the prosecutions were instituted by defendant 1 on behalf of their firm, being clothed with a power-of-attorney to do so.” All that appears, however, upon the evidence is, and indeed the plaintiff admits, that so far as defendants 3 to 6 are concerned, they had no hand in the prosecution, directly or indirectly, and that it was instituted by defendant 1 with the permission of defendant 2. This latter defendant was no doubt the managing partner, but the evidence clearly establishes that there was some misunderstanding between him and his partners, and that these partners were rather inclined

(1) (1894) 6 C. & P. 423.

(2) (1883) 11 Q. B. D. 674.

(3) (1879) 5 Cal. 281.

(4) (1881) 6 Cal. 582.

(5) (1884) 7 Mad. 292.

(6) (1903) 1 K. B. 81.

(7) (1830) 1 B. & Ad. 128, p. 135.

(8) (1812) 4 Taun. 616, p. 617.

1903.

AHMEDBHAI
v.
FRAMJI
EDULJI.

to support the plaintiff while defendant No. 2 was opposed to him. The mere fact that defendant No. 1 in instituting the prosecution described himself as the agent of the partnership, acting in the matter of the criminal complaint against the plaintiff on behalf of the firm, is not sufficient to render the firm or all the partners liable in damages to the plaintiff. There must be evidence to show that the firm was in some way or other concerned in the prosecution and had instigated it. There is no such evidence in the case; and we cannot hold defendants 3 to 6 liable merely because defendant 2, who directed defendant No. 1 to prosecute the plaintiff, was the managing partner. The prosecution is not shown to have been within the scope of defendant 2's authority.

The case as to defendant No. 2 stands upon a different footing. He authorised the prosecution and the evidence proves that all that was done in the matter of the two criminal complaints against the plaintiff was done by defendant 1 in consultation with him. In the first complaint, which was lodged on the 26th December, 1898, there were three charges and the Subordinate Judge has found that whereas as to two of them, the plaintiff has not been able to prove want of reasonable and probable cause, the third of these was distinctly a trumped up charge, supported by fabricated evidence. This third charge in the first complaint related to certain valves, which the plaintiff was alleged in the complaint to have removed to Bombay and misappropriated. The valves, however, were found buried underground in the small garden before the bungalow occupied by defendant 1 who was the complainant, and one slide valve was found in the compound of his bungalow. As to the second complaint, it related to five items alleged to have been misappropriated by the plaintiff. The Subordinate Judge finds that one of these five charges is not proved to have been without reasonable and probable cause; but he holds that in respect of the remaining four items, the complaint was preferred in a reckless and vindictive spirit.

Defendant No. 2 cannot escape from liability on the ground that some of the charges have not been proved to have been without reasonable and probable cause. In *Reed v. Taylor* ⁽¹⁾, Mansfield, C. J., said:—"The question is, whether, if a man pre-

(1) (1812) 4 Tamm. 616 p. 617.

1903.

AHMEDBHAI

v.

FRAMJI

EDULJI.

fers an indictment containing several charges, whereof for some there is, and for others there is not, probable cause, this does not support a count for preferring that indictment without probable cause, I am of opinion that it does:" see also *Ellis v. Abrahams*⁽¹⁾.

The question, therefore, which we have to consider is whether defendant No. 2 is proved to have acted without reasonable and probable cause and maliciously in authorising defendant No. 1 to prosecute the plaintiff. It is urged for him before us that, firstly, defendant No. 2 merely acted on information supplied to him by defendant No. 1, and that 2ndly, the plaintiff's conduct was such as to give reasonable ground to defendant No. 2 for believing that he was not acting honestly. As to the first of these two arguments, it is to be remarked that though it is true that defendant No. 2 acted on information supplied to him by defendant No. 1, as is shown by the letters received by defendant No. 2 from defendant No. 1 annexed to Ex. 258, those letters also show that defendant 2 must have known that defendant No. 1 was trying to get up false charges with the object of annoying the plaintiff because he had filed a suit for arrears of pay against the firm of defendants 2 to 6. The Subordinate Judge has discussed the evidence on this subject at length and it is not necessary for us to discuss it here, as we agree with him. The Subordinate Judge's finding is not only borne out by the evidence to which he has referred in his judgment but also by one of the letters (Ex. ²⁵⁸/₈) to which he has not referred but which was written by defendant No. 1 to defendant No. 2. This letter was dated the 26th May, 1898, whereas the first complaint against the plaintiff was lodged on the 26th December, 1898. In the letter in question, defendant 1 wrote to defendant 2, asking the latter to give a notice to the plaintiff to hand over certain property of the factory or else that he would be prosecuted criminally, and then defendant 2 asked defendant 1 "if possible send me this information from a different party that he" (*i.e.*, the plaintiff), "is on the point of going away somewhere else and then it will be very easy to proceed against him." There is no evidence in the case to show that defendant No. 2 sent the false information in the

(1) (1846) 3 A. & E. (N. S.) 709.

1903.

AHMEDBHAI

v.

FRAMJI

EDULJI,

manner suggested by defendant 1 in this letter ; all that appears is that a notice was given by defendant 2 to the plaintiff as suggested in the letter. But the letter proves that defendant No. 2 knew that defendant 1 was trying to get up a criminal charge against the plaintiff by means of concocted evidence and in fact asked defendant No. 2 to create evidence to enable him to proceed against the plaintiff in a Criminal Court. If defendant No. 2, with this knowledge, sanctioned the plaintiff's prosecution, which has been found to have been baseless and without reasonable and probable cause as to some of the charges, it follows that he did not act *bond fide* in the matter. "The test as to 'reasonable and probable cause' is whether the circumstances warranted a discreet man in instituting and following up the proceedings" (*Kelly v. Mid. G. W. Ry. Co.* ⁽¹⁾). "Was it reasonable and probable cause for any discreet man? Was it so to the maker of the charge?": *The Hon'ble G. N. Gajpathi Rau v. Narsing Rau Garu* ⁽²⁾. Judging by these tests, defendant 2's liability is clear and the Subordinate Judge rightly passed a decree against him. The plaintiff, it was urged, had given grounds for suspicion to defendant No. 2 by the fact that he had withheld the books of account of the factory ; but mere circumstances of suspicion, as was held in *Buss v. Gibbons* ⁽³⁾, cannot be relied on as evidence of reasonable and probable cause as a defence to an action for malicious prosecution. In that case, as Pollock, C. B., pointed out, "there were certain circumstances which might have led the defendant to make inquiries about the plaintiff, but they amount to nothing like reasonable or probable cause." In the present case, as has been very properly found by the Subordinate Judge, "the plaintiff has from the beginning admitted that he was in possession of the account books but persistently refused to hand them over to the defendants until the account between them was adjusted and arrears of pay due to him were paid. He had even given an undertaking in writing to the defendant 2 to pay whatever amount might be found due from him after examination and adjustment of the accounts." Further, the second defendant ought to have known, and the evidence shows that he knew,

(1) (1872) 7 Ir. R. C. L. 8.

(2) (1871) 6 Mad. H. C. R. 85.

(3) (1861) 30 L. J. Ex. 75 at p. 77.

1903.

AHMEDBHAI

v.

FRANJEE
EDULJI.

that the dispute with the plaintiff arose in the first place because of defendant 2's differences with his partners, and in the second place because the plaintiff had resigned when his situation had become an impossible one and his pay for several months had been withheld by defendant 2, the managing partner, without giving any reason for withholding it. He also knew that defendant 1, who had been sent as the plaintiff's successor in the management of the factory, was asking him (defendant 2) to create evidence to show that the plaintiff intended to run away. Defendant 2 made no inquiries of the plaintiff or of others but sanctioned the prosecution of the plaintiff after the latter had sued him and his partners in the Small Causes Court at Bombay for the arrears of his pay. The first complaint failed, the Magistrate having discharged the plaintiff, remarking that as to some of the charges against the plaintiff they created, if at all, a civil liability, and that as to one of the charges, it was trumped up. With all this knowledge, and when the plaintiff sought to execute the decree he had obtained in the Small Cause Court, the 2nd defendant authorized defendant 1 to file a second complaint against the plaintiff, which was dismissed summarily. We must, therefore, hold that the prosecutions were both malicious and without reasonable and probable cause. It was contended as to this complaint that as it had been dismissed summarily, no action for malicious prosecution could lie in respect of it. But the authorities referred to by the Subordinate Judge in his judgment show that "a prosecution commences when a complaint is made" (*Imperatrix v. Lakshman Sakharam*⁽¹⁾) and that it is not necessary, in order to maintain an action for malicious prosecution, that the charge was acted upon by the Magistrate. It is enough if the charge was made to the Magistrate with a view of inducing him to entertain it (Addison on Torts, 5th Ed., p. 200).

The damages awarded by the Subordinate Judge have, in our opinion, been correctly estimated.

We amend the decree of the Subordinate Judge by adding the words "Nos. 1 and 2" after the words "defendants" and rejecting the claim as against defendants 3 to 6. Defendant No. 2 should pay the costs of the plaintiff in this appeal and in the

(1) (1877) 2 Bom. 481 at p. 487.

Lower Court and bear his own. The plaintiff should pay to defendants 3 to 6 one set of their costs in the Lower Court. No order as to defendants 3 to 6's costs in this Court.

Decree amended.

1903.

AHMEDBHAI

v.

FRAMJI
EDULJI.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Jacob.

DAUDBHAI MUSABHAI (ORIGINAL OPPONENT), APPELLANT, v.

EMNABAI (ORIGINAL APPLICANT), RESPONDENT.*

1903.

September 29.

Limitation Act (XV of 1877), sections 5, 14—Appeal—Delay—Excuse—Time taken up in prosecuting an appeal in a wrong Court—Sufficient cause.

In a suit for partition, the High Court on regular appeal passed a decree on the 28th February, 1898. E. who was a party to the proceedings, applied to the Subordinate Judge on the 16th February, 1901, to execute the decree. D., who was also a party to the suit, opposed the application on the ground that it was time-barred. On the 4th March, 1902, the Subordinate Judge held the application to be presented within time. D. appealed to the District Court on the 20th March, 1902; but that Court on the 28th January, 1903, upheld the order passed by the Subordinate Judge. Against this decision D. preferred a second appeal to the High Court on the 17th April, 1903, on the ground that the District Court should have held that it had no jurisdiction to entertain the appeal. On the 23rd June, 1903, the High Court held that the District Judge had no jurisdiction to entertain the appeal and directed him to return the appeal to D. for presentation to the proper Court. The appeal was accordingly returned on the 11th July, 1903, to D., who filed it in the High Court on the 17th July, 1903. At the hearing a preliminary objection was raised that the appeal was presented beyond time and that the delay could not be excused:—

Held, that, the appeal was presented beyond time; and that, no sufficient cause for not filing the appeal before April, 1903, having been shown, the delay in presenting it could not be excused under section 5 of the Limitation Act (XV of 1877).

APPEAL from the decision of B. S. Joshi, First Class Subordinate Judge at Surat.

One Ismail brought a suit for partition against several persons, of whom Daudbhai (the appellant) was defendant No. 8 and Emnabai (the respondent) was defendant No. 5. In this litigation a final decree was passed by the High Court (First Appeal No. 118 of 1896) on the 28th February, 1898.

* First Appeal No. 108 of 1903.

1903.

DAUDBHAI
MUSABHAI
v.
EMNABAI.

Emnabai then, on the 16th February, 1901, applied to execute this decree in so far as it awarded her relief. This application was opposed by Daudbhai, who contended that it was time-barred; since Emnabai having only been joined as a *pro forma* respondent to the appeal in the High Court (F. A. No. 118 of 1896), she should have applied within three years of the date of the decree passed by the Subordinate Judge.

The Subordinate Judge held Emnabai's application to be presented within time, and on the 4th March, 1902, he granted the prayers contained in the application: and passed on the 21st March, 1902, an order as to costs.

On the 20th March, 1902, the opponent Daudbhai appealed to the District Court, for though the claim in the original suit was over Rs. 5,000, the value of the property to which the application for execution related was Rs. 25 only.

On the 28th January, 1903, the District Judge confirmed the order of the Subordinate Judge and dismissed the appeal with costs.

Against this decision the opponent appealed to the High Court on the 17th April, 1903 (S. A. No. 219 of 1903).

On the 23rd June, 1903, the High Court held that the District Judge had no jurisdiction to entertain the appeal, and directed him to return the appeal to the opponent for being presented to the proper Court.

The District Judge accordingly directed, on the 11th July, 1903, the return of petition of appeal to the appellant.

On the 17th July, 1903, the present appeal was filed in the High Court.

On the 14th August, 1903, Jacob, J., excused delay, "having regard to section 14 of the Limitation Act, subject to respondent's right to object."

When the appeal came on for hearing before Chandavarkar and Jacob, JJ., the respondent's pleader raised a preliminary objection that the appeal was time-barred and the delay could not be excused.

M. K. Mehta, for the respondent:—We submit that the appeal is beyond time. The appellant was a respondent in the High Court Appeal (F. A. No. 118 of 1896), and so he ought to have

known that an appeal against an order in execution proceedings lay to the High Court and not to the District Court. He came to know that at least on the 17th April, 1903, when the memorandum of appeal in S. A. No. 219 of 1903 was filed in the High Court. He ought to have then filed a first appeal from the decree of the Subordinate Judge instead of waiting for the disposal of the second appeal, because the decree of the District Court having been passed without jurisdiction was a nullity.

Section 14 of the Limitation Act (XV of 1877) does not apply to appeals. Delay in filing an appeal can be excused under section 5 of the Act. We rely on *Balaram v. Sham Sunder*⁽¹⁾; *Jag Lal v. Har Narain Singh*,⁽²⁾ and *Ramjiwan Mal v. Chand Mal*⁽³⁾. If there is a *bond fide* mistake, delay can be excused. In this case the appellant came to know that the appeal lay direct to the High Court at least in April, 1903. Still he did not immediately file an appeal. He ought in no event to have waited till the disposal of the second appeal.

G. K. Parekh, for the respondent.—There was a *bond fide* mistake on the part of the appellant and so the delay ought to be excused. We could not file a first appeal to the High Court as long as the decree of the District Judge was not set aside, and the decree of the Subordinate Judge was merged in the decree of the District Court.

CHANDAVARKAR, J.—As regards the preliminary point, we must allow Mr. Mehta's contention that the appeal is beyond time. There has been no sufficient cause for not filing the appeal before April, 1903. The appeal lay direct to this Court and the appellant knew that at least in April, 1903. Nevertheless he filed a second appeal instead of at once appealing from the Subordinate Judge's decree to this Court and getting the delay excused. There is no sufficient cause under section 5 of the Limitation Act to justify us in excusing the delay.

We must, therefore, dismiss this appeal with costs.

Appeal dismissed.

(1) (1896) 23 Cal. 526.

(2) (1888) 10 All. 524.

(3) (1888) 10 All. 587.

1903.

DAUDBHAI
MUSABHAI
v.
EMNABAI.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Jacob.

1903.
September 29.

PURUSHOTTAM BHASKAR NADKARNI (ORIGINAL PETITIONER),
APPELLANT, v. BALKRISHNA PANDURANG NADKARNI AND OTHERS
(ORIGINAL OPONENTS), RESPONDENTS.*

*Civil Procedure Code (Act XIV of 1882), section 265—Execution of decree
—Partition by Collector—Objections to the partition—Court's jurisdiction
to hear the objections.*

Where a decree is sent to the Collector for execution under section 265 of the Civil Procedure Code (Act XIV of 1882), and the Collector contravenes the decretal command of the Court or otherwise acts *ultra vires*, his action is subject to the control and correction of the Court which passed the decree and sent it to him for execution.

Dev Gopal v. Vasudev⁽¹⁾ and *Ganoji v. Dhondur*⁽²⁾ followed.

SECOND appeal from the decision of W. Baker, Assistant Judge of Ratnagiri, confirming the order passed by K. N. Bhide, Subordinate Judge of Vengurla.

Balkrishna Pandurang Nadkarni (respondent 1) brought a suit (Suit No. 179 of 1892) to recover his share by partition of certain lands and joint possession of his shares in other lands.

The Subordinate Judge ordered that the plaintiff should recover separate and joint possession of the shares as asked for in the plaint, and ordered that the defendants should get separate possession of their shares.

On appeal, this decree was "varied by adding a direction that lands yielding yearly Rs. 50 as net profits shall be given to defendant No. 16 out of the property coming to the shares of the plaintiff and defendants 12 to 15."

The application (No. 343 of 1898) to execute this decree was referred by the Subordinate Judge to the Collector for making a partition under section 265 of the Civil Procedure Code (Act XIV of 1882).

The Collector effected a partition, which was objected to by some of the defendants. One of the grounds of objection was :

* Second Appeal No. 246 of 1903.

(1) (1887) 12 Bom. 371.

(2) (1890) 14 Bom. 450.

"That in violation of the decretal order defendant No. 16 has not been allotted land yielding an income of Rs. 50 out of the land that was to go to the shares of plaintiff and defendants 12 to 15."

The Subordinate Judge dismissed the objections on the ground that "the Court has no jurisdiction to interfere with the partition made by the Collector: *Shrinivas v. Hanmant* (I. L. R. 15 Bom. 527)." In dealing with the particular objection set out above, he remarked: "The decree of the Appellate Court directs that lands yielding yearly Rs. 50 as net profits should be given to defendant No. 16 out of the property coming to the shares of the plaintiff and defendants 12 to 15. This direction has not been obeyed, as appears from the Circle Inspector's report accompanying Exhibit 8. But there was no help. In execution of the decree defendant No. 16 has not applied for partition of his share. So have not defendants 12 to 14 as well. The direction could not, therefore, be carried out."

An appeal against this order was dismissed by the Lower Appellate Court with the remark: "It is unnecessary to go into the merits of the case, as no appeal lies to the Civil Court against a partition made by the Collector under section 265, Civil Procedure Code. This is clearly laid down in *Shrinivas Hanmant v. Gurunath Shrinivas* (I. L. R. 15 Bom. 527)."

The petitioner appealed to the High Court.

C. A. Rele, for the appellant (applicant):—The decree in this case was sent to the Collector for execution under section 265 of the Civil Procedure Code (Act XIV of 1882). The Collector executing a decree for partition is a ministerial officer and he is not to contravene the command of the Court. The Court which made the decree has power to hear and decide objections to the division of the estate made by the Collector: *Dev Gopal v. Vasudev*⁽¹⁾; *Ganoji v. Dhondur*⁽²⁾; *Chinna Seetayya v. Krishnavamma*⁽³⁾; *Krishnaji v. Damodar*⁽⁴⁾. Therefore the Lower Courts were wrong in holding that they had no jurisdiction to interfere with the partition made by the Collector. The case should be sent back for a decision on the merits. The case of *Shrinivas v.*

1903.

PURU-
SHOTTAM
BHASKAR

v.
BALKRISHNA
PANDURANG.

(1) (1887) 12 Bom. 371.

(2) (1890) 14 Bom. 450.

(3) (1886) 19 Mad. 435.

(4) (1903) 5 Bom. L. R. 648.

1903.

PURU-
SHOTTAM
BHASKAR
v.
BALKRISHNA
PANDURANG.

Gurunath⁽¹⁾ is distinguishable. The Collector did not carry out the directions in the decree.

S. S. Patkar, for the respondents No. 1 and 2 (opponents):—The case relied upon by the Lower Courts, viz., *Shrinivas v. Gurunath*⁽¹⁾ applies. The appellant did not apply for partition of his share. So, the direction in the decree could not be carried out.

CHANDAVARKAR, J.:—The Lower Courts are not right in supposing that a Civil Court has no jurisdiction to hear objections in any case to a partition effected by a Collector in the execution of a decree of that Court sent to him under section 265 of the Civil Procedure Code. The case⁽²⁾ relied upon by the Lower Courts does not support that view, and other decisions of this Court, for instance, *Dev Gopal Savant v. Vasudev Vithal Savant*⁽³⁾ and *Ganaji Utekar v. Dhondur*⁽⁴⁾, show that where a Collector has in partitioning an estate contravened the decretal command of the Court or otherwise acted *ultra vires*, his action is subject to the control and correction of the Court which passed the decree and sent it to him for execution. In the present case one of the objections raised by the appellant before us is that whereas the decree directed that out of lands to be awarded to the plaintiff and defendants Nos. 12 to 15 lands should be allotted to defendant No. 16 which can yield a net profit of Rs. 50 a year, the Collector has contravened that direction in the partition he has made. If that objection is good, that is, if there is such a direction in the decree and the Collector has made his partition without giving effect to it, his action would be clearly *ultra vires*, and the Court has jurisdiction to set aside the partition wholly or partially as the case may be, and ask the Collector to make a fresh partition in accordance with the terms of the decree. We express no opinion on the merits, but merely hold that the Courts below ought to go into the objections raised and decide whether each of them falls within their jurisdiction, and, if it does, it ought to be disposed of on the merits. We reverse the order of the

(1) (1890) 15 Bom. 527.

(2) *Shrinivas v. Gurunath* (1890) 15 Bom. 527.

(3) (1887) 12 Bom. 371.

(4) (1890) 14 Bom. 450.

Lower Court and remand the case to be dealt with by the Lower Appellate Court with reference to the remarks above. Costs to abide the result.

Order reversed. Case remanded.

1903.
PURU-
SHOTAM
BHASKAR
v.
BALKRISHNA
PANDURANG.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Jacob.

KRISHNAJI SAKHARAM PINGLE (ORIGINAL DEFENDANT NO. 1),
APPELLANT, v. ANANT AND KESHAVRAO AND OTHERS (ORIGINAL
PLAINTIFFS AND DEFENDANT NO. 2), RESPONDENTS.*

1903.
September 10.

Pensions Act (XXIII of 1871), section 6—Collector—Certificate—Civil Court—Suit to recover share of allowance for particular years—Certificate referring only to some years.

A certificate granted by the Collector under the Pensions Act (XXIII of 1871) authorized the plaintiff to recover his share in the allowance for the years 1889-90 to 1896-97. On the strength of this certificate, the plaintiff brought a suit to recover his share of the allowance for the years covered by the certificate and also for the year 1897-98. The Lower Appellate Court disallowed plaintiff's claim so far as it related to the year 1897-98, on the ground that that year was not included in the certificate :—

Held, that the certificate given by the Collector might refer only to the plaintiff's share in the allowance for particular years, but if the Collector permitted the plaintiff to establish his right to a share in a Civil Court, the plaintiff was not bound under the Pensions Act to get a certificate for each year's allowance before suing for it. The general right being allowed and established, the right to each year's share follows as consequent upon it.

SECOND appeal from the decision of Gangadhar V. Limaye, First Class Subordinate Judge, A. P., at Poona, varying the decree passed by R. G. Bakhle, Subordinate Judge of Haveli.

The plaintiffs brought this suit to recover by partition the separate possession of certain property, and to recover their share in the allowance (Deshpande Hak) for the years 1889-90 to 1897-98.

* Second Appeal No. 53 of 1903.

1903.

KRISHNAJI
SAKHARAM

v.

ANANT.

Previously to the bringing of this suit, the plaintiffs obtained from the Collector a certificate under the Pensions Act (XXIII of 1871). The certificate ran as under:—

Whereas Waman Gopal, Anant Gopal, and Keshva Gopal Pingle Deshpande, all of Donge, Táluka Haveli, Poona District, are desirous of preferring a claim against Krishnaji Sakharam Pingle, residing at Vinehur, Táluka Niphád, Násik District, to recover their share of half of the amount of Rs. 18 annually paid from the Haveli Sub-Treasury in the Poona District to Krishnaji Sakharam for Deshpánde huk in the village of Kondhre Dhavdi, Táluka Haveli, for the years 1889-90 to 1896-97:

This is to certify that I, Arthur Rivers Bonus, Collector of Poona, do hereby allow, under section 6 of the Pensions Act, 1871, that the said claim may be tried by any Civil Court otherwise competent to try the same.

The Subordinate Judge awarded the plaintiff's claim.

On appeal the First Class Subordinate Judge modified this decree by disallowing the plaintiff's claim to a share in the allowance for the year 1897-98, on the ground that it was not covered by the certificate granted by the Collector under the provisions of section 6 of the Pensions Act (XXIII of 1871).

Defendant 1 appealed to the High Court; and the plaintiff filed a cross-objection that (1) the Lower Appellate Court erred in law in reducing the amount for 1897-98 in appeal.

N. M. Samarth, for the appellant.

S. R. Bakhle, for the respondents.

CHANDAVARKAR, J.:—We think that, as far as the appeal is concerned, the decree of the Lower Court must be confirmed. Two points were raised by Mr. Samarth, pleader for the appellant; one of them was that we should not accept as conclusive the finding of the Lower Appellate Court on issues Nos. 3 and 4. The Subordinate Judge, with Appellate Powers, has examined the evidence on which it was quite competent for him to give to the plaintiff the relief he sought. He has accepted the plaintiff's version and held that the property was reserved as joint at the previous partition.

The second point raised by Mr. Samarth relates to issue No. 3. It appears that defendant No. 2 in his deposition has stated that there is certain property in the possession of the plaintiff which is still joint. As to this it is to be remarked that the Subordinate

Judge held that the property need not be brought into hotchpot and that the suit could proceed. The Subordinate Judge, with Appellate Powers, says:—"The appellant has not adduced any evidence to show that the respondents are in possession of any property which is still the joint property of the parties." It is true that there was defendant No. 2's evidence, but the Subordinate Judge, A. P., must be taken to have meant that there was no evidence beyond the interested statement of defendant No. 2. We cannot, therefore, interfere with the finding of the Subordinate Judge, A. P., on issue No. 3.

Then there are the cross-objections filed by the respondents. These cross-objections deal with the finding of the Lower Appellate Court on issue No. 6. That Court has declined to give to the plaintiff a share in the allowance for the year 1897-98 because the Collector's certificate under the Pensions Act refers only to the years 1889-90 to 1896-97. But, in our opinion, if the Collector once gives a certificate which entitles a party to claim a certain right in a Civil Court, then the effect of that certificate is to give to the party the right to claim in a Civil Court whatever he is entitled to in virtue of that right. The certificate given by the Collector may refer only to the plaintiff's share in the allowance for particular years, but if the Collector permitted the plaintiff to establish his right to a share in a Civil Court, the plaintiff was not bound under the Pensions Act to get a certificate for each year's allowance before suing for it. The general right being allowed and established, the right to each year's share follows as consequent upon it.

We think, therefore, we must modify the decree of the Lower Appellate Court by awarding to the respondents Rs. 98-11-6 and costs in proportion throughout. The appellant must pay to the respondents the costs of this appeal as well as of the cross-objections.

Decree varied.

1903,
KRISHNAY
SAKHARAM
v.
ANANT.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Aston.

1903.

November 17.

SAMBHU DHANAJI (ORIGINAL DEFENDANT), APPELLANT, *v.* RAM
VITHU SARANG (ORIGINAL PLAINTIFF), OPPONENT.*

*Provincial Small Cause Courts' Act (IX of 1887), section 32 (2)—Small
Cause Suit—Jurisdiction extended pending suit—Appeal.*

A suit to recover Rs. 81-4 was filed in the Court of a Subordinate Judge who was at the time invested with the jurisdiction of a Court of Small Causes to the extent of Rs. 50. Later the jurisdiction of the Subordinate Judge as a Court of Small Causes was raised to Rs. 100 and subsequently to this the suit was decided by him as a regular suit and the claim was allowed. On appeal by the defendant the District Judge held that no appeal lay on the ground that the suit was triable and must be taken to have been tried by the Subordinate Judge in the extended jurisdiction vested in him as a Judge of the Court of Small Causes:—

Held, on an application by the defendant under section 622 of the Civil Procedure Code (Act XIV of 1882) that the appeal lay to the District Judge. Under section 32 (2) of the Provincial Small Cause Courts' Act (IX of 1887), it was necessary that the Judge should before the institution of the suit be invested with a Small Cause Court jurisdiction entitling him to hear the particular suit.

Hari Kamayya v. Hari Venkayya⁽¹⁾ followed. *Balchand v. Balaram*⁽²⁾ explained.

APPLICATION under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of H. Page, Acting District Judge of Ratnágiri, dismissing an appeal against the decree of N. B. Mujumdar, Subordinate Judge of Devgad.

The plaintiff, on the 13th August 1901, sued to recover from the defendant Rs. 81-4 due upon a bond. The defendant contended that the bond was forged and denied his liability to pay the debt. The Subordinate Judge found that the bond was proved and allowed the claim on the 18th March 1902.

On appeal by the defendant, the plaintiff raised a preliminary objection urging that the decree of the Subordinate Judge was not appealable on the ground that the suit was one in the nature of a Small Cause Court suit. Though the Subordinate Judge was, when the suit was filed, invested with small cause jurisdiction

* Application No. 159 of 1903 under the Extraordinary Jurisdiction.

(1) (1903) 26 Mad. 212.

(2) (1903) 5 Bom. L. R. 398.

to the extent of Rs. 50, still as his small cause jurisdiction was extended to Rs. 100 in October 1901, that is, before the decree, and the suit being for the recovery of Rs. 81-4 only, it fell within the small cause jurisdiction of the Subordinate Judge notwithstanding that it was tried as a regular suit. The defendant answered that though the suit was in the nature of a small cause suit, still regard must be had to the pecuniary jurisdiction of the Judge at the time when the suit was filed. The Subordinate Judge was, at the time of the filing of the suit, invested with small cause jurisdiction to try claims up to Rs. 50 only, while the claim in the present case being above Rs. 50, the Subordinate Judge tried it as a regular suit and not as small cause one. The decree was, therefore, appealable. The Judge allowed the plaintiff's contention and held that no appeal lay.

The defendant preferred an application under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) urging *inter alia* that the Judge erred in holding that the decree of the first Court was not appealable. A *rule nisi* having been issued requiring the plaintiff to show cause why the order of the Judge should not be set aside;

V. M. Mone appeared for the applicant (defendant) in support of the rule :—The first Court was not invested with small cause jurisdiction up to Rs. 100 when the suit was filed. It was invested with jurisdiction to that extent after the commencement of the proceedings. We, therefore, submit that the provisions of section 32 (2) of the Provincial Small Cause Courts' Act are applicable. The suit was taken up by the Court in the exercise of its ordinary jurisdiction and the nature of the suit did not change simply because the Court's small cause jurisdiction was extended before the date of the decree. The Judge in appeal has not given effect to section 32 (2).

[JENKINS, C. J.:—The ruling in *Hari Kamayya v. Hari Venkayya*⁽¹⁾ supports your contention.]

N. V. Gokhale appeared for the opponent (plaintiff) to show cause :—Under section 32 (2) of the Provincial Small Cause

1903.

SAMBHU
DHANAJI
v.
RAM VITHU.

(1) (1903) 26 Mad. 212.

1903.

SAMEHU
DHANAJI
v.
RAM VINHU.

Courts' Act it is enough if a Court is already invested with the jurisdiction of a Court of small causes at the time of the institution of a suit. The present suit is a suit of small cause nature and it was decided by a Court having the jurisdiction of a Court of small causes when the suit was instituted. The section does not define the extent of jurisdiction. The pecuniary limit may vary but that would not make any change in the jurisdiction. In *Balchand v. Balaram*⁽¹⁾ it was held that a counter-claim for Rs. 120 made by a defendant could be entertained by a Subordinate Judge whose small cause jurisdiction had been enlarged from Rs. 50 to Rs. 200 before the date of the decree. A counter-claim or set-off is according to law, like a plaint in a cross-suit and is chargeable with a Court-fee payable on a plaint: *Bai Shri Majirajbai v. Narotam Hargovan* ⁽²⁾. The fact that the question of jurisdiction arose with reference to a counter-claim does not affect our contention. The Full Bench decision of the Madras High Court in *Hari Kamayya v. Hari Venkayya*⁽³⁾ does not give reasons for not construing section 32 (2) as it stands and for importing into it considerations regarding the pecuniary jurisdiction. A party would, no doubt, be deprived of his right of appeal in cases like the present according to our interpretation of the section. But the legislature itself has provided that in certain suits of small cause nature no appeal shall lie, therefore, there is no ground for putting a restricted interpretation on the section.

Mone, in reply:—If the plaintiff's contention were correct, then the object of section 32 (2) would be frustrated.

JENKINS, C. J. :—This suit was filed on the 13th of August 1901 in the Court of a Subordinate Judge who was at the time invested with the jurisdiction of a Court of small causes to the extent of Rs. 50. But as the plaintiff's claim was over Rs. 81-4 it did not fall within the Small Cause Court jurisdiction of the Subordinate Judge. Later the jurisdiction of the Judge as a Court of small causes was raised to Rs. 100, and subsequently to this, the suit was decided by him as a regular suit.

(1) (1903) 5 Bom. L. R. 398.

(2) (1889) 13 Bom. 672.

(3) (1903) 26 Mad. 212.

The present petitioner, the defendant in the suit, appealed to the District Judge, who held that no appeal lay on the ground that the suit was triable and must be taken to have been tried in the extended jurisdiction vested in him.

The petitioner now applies to us under section 622 of the Code of Civil Procedure, urging that the District Court failed to exercise the jurisdiction vested in it.

The question thus raised must be determined by reference to the language of section 32 of the Provincial Small Cause Courts' Act (IX of 1887) which provides in sub-section 1 that "so much of Chapters III and IV of the Act as relates to the finality of their decrees and orders applies to Courts invested by or under any enactment for the time being in force, with the jurisdiction of a Court of small causes, so far as regards the exercise of that jurisdiction by those Courts." But in the 2nd sub-section of section 32 it is provided that "nothing in sub-section 1, with respect to Courts invested with the jurisdiction of a Court of small causes applies to suits instituted or proceedings commenced in those Courts before the date on which they were invested with that jurisdiction."

The language is not very happily chosen ; because, to apply it to the circumstances of this case, we find that the particular Subordinate Judge was invested with the jurisdiction of a Court of small causes before the date on which the suit was instituted, but not with that jurisdiction to an extent which would have entitled him to dispose of this suit. So that there is an ambiguity in the language as to whether the Judge must have been not only invested with the jurisdiction of a Court of small causes, but also with that jurisdiction to an extent in value entitling him to hear and dispose of the particular suit.

The question, however, has come before a Full Bench of the Madras High Court by whom it has been held that the object of the sub-section is to prevent doubts arising as to whether the investment of a Court with small cause jurisdiction acted retrospectively with reference to a suit which had not commenced in that Court before the Court was so invested, and it was there determined that under sub-section 2 it was necessary that the Judge should before the institution of the suit be vested with a

1903.

SAMBHU
DHANAJI
v.
RAM VITHU.

1903.

SAMBHU
DHANAJI
2.

RAM VITHU.

Small Cause Court jurisdiction entitling him to hear the particular suit: *Hari Kamayya v. Hari Venkayya*⁽¹⁾.

We think that in matters of this kind it is desirable that there should be uniformity of decision through the various Courts in different parts of India, and that we may well follow this decision of the Madras Full Bench Court.

It has been argued that the decision of this Bench in *Balchand v. Balaram*⁽²⁾ requires that we should come to a different conclusion. But we think not: that case turns upon its own very special circumstances, and does not appear to us to be an authority on the facts with which we are at present dealing.

In our opinion, therefore, the rule should be made absolute, and the case should go back in order that the District Court may re-admit and deal with the appeal.

Cost of this rule will be costs in the appeal.

Rule made absolute.

(1) (1902) 26 Mad. 212.

(2) (1903) 5 Bom. L. R. 398.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Aston.

GOPAL DAJI SATHE (PLAINTIFF) v. GOPAL BIN
SONU BAIT (DEFENDANT).*

1903.

November 26.

Limitation Act (XV of 1877), section 20—Principal—Surety—Payment of interest by principal—Liability of surety.

The payment of interest by the debtor within limitation does not give fresh starting point for limitation against the surety under section 20 of the Limitation Act (XV of 1877) even in the absence of a prohibition by the surety against the payment of interest by the debtor on his account.

CIVIL reference made by K. S. Bodas, Subordinate Judge of Chiplun, under section 617 of the Civil Procedure Code (Act XIV of 1882).

The reference was in these terms:—

The plaintiff sues to recover Rs. 30 principal and interest due upon a simple unregistered money bond, dated 22nd October, 1891

* Civil Reference No. 12 of 1903.

executed by defendant 1 as the principal debtor and by deceased Gopal Sajnoji as surety for him. The bond provides for repayment by monthly instalments in eight months since 22nd March, 1892. Interest was only paid from time to time each time within limitation and these payments are endorsed on the bond and signed by both the principal debtor and surety. The last of these payments was made on 8th August, 1899. The surety then died, and after that the principal debtor paid interest on 23rd July, 1902. The suit was instituted on 12th January, 1903. Unless the payment made by the debtor on 23rd July, 1902, saves the claim from limitation against the surety also the claim would be barred against defendants 2 and 3. The question, therefore, for consideration is whether payment of interest by the principal debtor within limitation gives a new starting point against the surety also under section 20 of the Limitation Act. The previous payments made under the signatures of the debtor and the surety do not afford any proof that the debtor had authority from the surety to pay interest to the creditor. Nor does the death of the surety before the last payment was made alter the position. The surety was dead, but his estate continued to be liable. The authority of the debtor to pay interest was not affected by the surety's death. The former payments of interest by both the debtor and the surety and the death of the surety before the last payment was made by the debtor should, therefore, I think, be excluded from consideration in determining the question under consideration.

After the debt became payable under the terms of the bond the debtor and the surety became joint promisors, that is, joint contractors, within the meaning of section 21 of the Limitation Act. Under sections 20 and 21 one of joint contractors is not chargeable by reason only of a payment made by or by the agent of any other of them. But where from the nature of the business or relations between the joint contractors or otherwise the debtor paying the interest was to have the power to make the payment so as to be binding on the other contractors, a new period of limitation begins to run against these contractors also. This is so when a payment is made by the manager of a joint Hindu family or by a partner in a going concern (I. L. R.

1903.

GOPAL DAJI

?.
GOPAL BIN
SONU.

1903.

GOPAL DAJI
v.
GOPAL BIN
SONU.

17 Cal. 951; I. L. R. 10 All. 418). The authority of a manager or of a partner in a firm to make a payment binding on the other coparceners or partners is presumed from the relations existing between them. Similarly, such authority in the principal debtor ought, I think, to be presumed from the relation existing between him and the surety. Both are indeed jointly liable to the creditor as all the coparceners and the partners are in the cases supposed. But as between themselves the debtor is liable to pay the debt, and if the surety is required to pay it, he can recover it from the principal debtor. Such being the relation, it ought, I think, to be presumed that, in the absence of any prohibition by the surety or debtor his authority to pay the interest binding upon the surety as well as himself for the purpose of section 20 of the Limitation Act, a creditor is entitled to look upon the payment made by the debtor as made by him on his own account and as agent of the surety. Under the English law, payment of interest by the debtor keeps the debt alive against the surety also: *Allison v. Frisby* (43 Ch. D. 106). There is nothing in the relation between a debtor and a surety as stated in the Indian Contract Act to show that the same principle should not be applicable here also. The question is not, however, free from doubt, and as it is of frequent occurrence and there does not appear to be any authoritative ruling upon it by the Indian Courts, I think it proper to refer it for the consideration of the Honourable the High Court. *Cockrill v. Sparkes* (1 H. & C. 699) seems not to be quite consistent with the English case quoted above. The question for consideration then is:—

In the absence of any prohibition by the surety against the payment of interest by the debtor on his account, does payment of interest by the debtor within limitation give a fresh starting point for limitation against the surety also under section 20 of Act XV of 1877?

My opinion on the point is in the affirmative.

Ratanlal Ranchhodas (amicus curiæ), for the plaintiff, cited *In re Powers*, *Lindsell v. Phillips*,⁽¹⁾ and *In re Frisby. Allison v. Frisby*⁽²⁾.

(1) (1835) 30 Ch. D. 291.

(2) (1889) 43 Ch. D. 106.

N. K. Metha (amicus curie), for the defendants, cited *Cockrill v. Sparkes*⁽¹⁾ and *Henton v. Paddison*⁽²⁾.

1903.

GOPAL DAS
v.
GOPAL BIN
SONU.

JENKINS, C. J.:—Under section 617 of the Code of Civil Procedure the following point has been referred for our decision:—"In the absence of any prohibition by the surety against the payment of interest by the debtor on his account, does payment of interest by the debtor within limitation give a fresh starting point for limitation against the surety also under section 20 of Act XV of 1877?" It is by that section provided that when interest on a debt is before the expiration of the prescribed period paid as such by the person liable to pay the debt or by his agent duly authorized in this behalf, a new period of limitation according to the nature of the original liability shall be computed from the time when the payment was made.

We have therefore to see what was the debt on which interest was paid. It arises under the bond, dated the 22nd of October, 1891, whereby one Gopal Sonu Bait, stating that for his own necessity he had borrowed 20 rupees, stipulated that after five months from the day of the bond he would pay up the amount by eight instalments, paying 3 rupees a month, and that in default of payment of an instalment interest at 25 per cent. should be paid. By the same document Gopal Sajanojirao Jedde stood security for the due performance of the obligation, and agreed that if the principal failed to pay, he himself would pay up the amount without pleading excuse. Gopal Sajanojirao's liability therefore was that of a surety as defined by section 126 of the Contract Act. There are thus under this document two liabilities in two different persons, Gopal Sonu's liability as the principal, Gopal Sajanojirao's as the surety. How then can the payment of interest by Gopal Sonu, the principal debtor, create a new period of limitation for the surety's debt? Let us apply the words of section 20 to the case: the principal is not *the person liable to pay the debt* of the surety; so that even if the payment of interest could be regarded as a payment of interest on the debt of the surety, still it was not made by a person liable to pay the surety's debt. Can it then be said that there was a payment of

(1) (1863) 1 H. & C. 699.

(2) (1893) 68 L. T. 405.

1902.

GOPAL DAS

2.

GOPAL BIN

SONU.

interest on the surety's debt by an agent duly authorized in this behalf? Apart from the difficulty of treating the interest as due on the surety's debt, we think this must be answered in the negative: the question propounded in the reference excludes an express authority, and (in our opinion) the relation of principal and surety does not give rise to any implied authority (see *Cockrill v. Sparkes*⁽¹⁾ and *Henton v. Paddison*⁽²⁾).

The actual decisions in *Lindsell v. Phillips*⁽³⁾ and *Allison v. Frisby*⁽⁴⁾ do not (we think) involve any principle inconsistent with the conclusion at which we have arrived; they turned on a statute and considerations which have no place here, and, in the circumstances, did not invite the discussion necessary to the determination of the present case.

Those cases, however, are useful as a recognition of the view that the liabilities of a principal and his surety under circumstances like the present (whatever may be the case when they contract a joint and several debt) are distinct.

It is no doubt provided by section 128 of the Contract Act that the liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract, but that section must be read together with the Limitation Act, and not so as to nullify its provisions, limiting the time within which a suit must be brought after the accrual of a cause of action (see *Hajarimal v. Krishnarav*⁽⁵⁾).

The reference, therefore, must (in our opinion) be answered in the negative.

(1) (1868) 1 H. & C. 629.

(3) (1885) 30 Ch. D. 291.

(2) (1898) 68 L. T. 405.

(4) (1889) 43 Ch. D. 106.

(5) (1881) 5 Bom. 647.

ORIGINAL CIVIL.

*Before Mr. Justice Russell and on appeal before Mr. Justice Chandavarkar
and Mr. Justice Batty.*

APPEAL No. 1298.

HAJI ISMAIL HAJI ESSAC (ORIGINAL APPLICANT), APPELLANT, v.
THE MUNICIPAL COMMISSIONER OF BOMBAY (RESPONDENT).

1903.

November 17.

APPEAL No. 1299.

AHMED MOOSA AND ANOTHER (ORIGINAL APPLICANTS) v. THE
MUNICIPAL COMMISSIONER OF BOMBAY (RESPONDENT).

*License—City of Bombay Municipal Act (III of 1888), section 394—Specific
Relief Act (I of 1877), section 45—Discretion.*

The power of the Municipal Commissioner of Bombay to grant a license under section 394 of the City of Bombay Municipal Act (III of 1888) includes the power to refuse it.

PER CURIAM: The Court cannot substitute its judgment for that of the Municipal Commissioner. Unless it is clear beyond doubt that the Municipal Commissioner is using his authority with some indirect motive and for a collateral purpose, not for the purpose for which the Legislature has armed him with the power, the Court cannot interfere with his discretion.

MOTION. *

On the 27th of February, 1903, the applicant, Haji Ismail Haji Essac, obtained an order calling upon the Municipal Commissioner to show cause why he should not grant to the petitioner licenses to keep buffaloes in sheds situate at 48 and 53, Gawli Moholla, Memonwada. A similar order was obtained by the applicant Ahmed Moosa on the 6th of March, 1903.

The facts in Haji Ismail's case are set out in detail in the judgment of Russell, J.

The Exhibits B and C referred to in the judgment were two letters addressed by the Municipal Superintendent of Licenses to the applicant, the first of which was dated the 6th of June, 1902, and was in the following terms:—

"Mr. Haji Ismail Haji Essac is hereby informed that as his milch-cattle stable at No. 48, Memonwada Road, has been found a source of serious nuisance

* NOTE.—The application was made by motion in accordance with the ruling of Russell, J., reported in I, L. R. 27 Bom. 307.

1903.

HAJI ISMAIL

v.

THE
MUNICIPAL
COMMISSIONER OF
BOMBAY.—
AHMED
MOOSA

v.

THE
MUNICIPAL
COMMISSIONER OF
BOMBAY.

to the residents of the locality owing to its bad situation and faulty structure the Municipal Commissioner has, on the advice of the Health Officer, decided not to renew its license for the current official year 1902-03.

With a view to give him sufficient time to arrange about the removal of his animals, to a better stable he is further informed that action under section 394 of the Municipal Act will be taken against him if he fails to remove his animals from the stable in question by the 31st October next."

The second letter (Exhibit C) was dated the 24th June, 1902, and was in almost identical terms, save that it stated that the Health Officer had decided not to renew the license.

The facts in Ahmed Moosa's case were very similar to those in Haji Ismail's case.

In the affidavit of the Municipal Commissioner dated the 29th June, 1903, he stated:—

"I have personally visited the said stables in Parel Road and also the proposed site in DeLisle Road and am of opinion that under no circumstances ought the license for the said stables in Parel Road to be renewed even temporarily, and as regards the premises in DeLisle Road I am further of opinion that it is not advisable in the public interests to grant a license for a buffalo-stable for the use of more than 100 buffaloes."

On the 30th September, 1902, the following letter was addressed by the Municipal Commissioner to the applicants:—

"With reference to your letter of the 8th instant I have the honour to state that it is reported that from a sanitary point of view the proposal is objectionable as a large milch-cattle stable on the site referred to would prove a serious nuisance to persons residing in the neighbourhood."

On the 8th November, 1902, he wrote as follows:—

"In reply to your letter of 10th ultimo I have the honour to inform you that I am prepared to allow a license to be given for a milch-cattle stable for 100 cattle on the site referred to, subject to all the requirements of the Health Officer being complied with."

The motion came on for hearing before Russell, J., who after argument delivered the following judgment in Haji Ismail Haji Essac's case:

RUSSELL, J.—On the 24th March, 1903, Haji Ismail Haji Essac the applicant, applied that the Municipal Commissioner should show cause why he should not grant to the applicant licenses to keep buffaloes in sheds Nos. 48 and 53 at Gawli Moholla, Memonwada. In his affidavit the applicant says that the said two sheds

have been used as buffalo-stables for more than sixty years, and by him for the last twenty years thereof, and the Municipality granted him licenses from year to year during those twenty years. On the 21st April, 1903, he applied for a renewal of the license, and on that day he was asked to pay Rs. 25, the license-fee for his buffalo-stable at No. 48. On the 6th of June he got a letter from the Municipality saying that stable No. 48 was found a source of serious nuisance to the residents of the locality, and that the license for 1902-03 could not be granted. On the 24th June he received a similar notice that the license for stable No. 53 could not be renewed. His affidavit goes on to describe the situation of the said stables respectively and the properties adjoining thereto. He further refers to complaints made against his stable No. 53 in 1894 and 1898. He says that those complaints came to nothing. In 1899 he says the Municipal authorities were satisfied that there was no nuisance with regard to either of these stables. In 1894 and 1902 he did certain repairs to the stables by order of the Municipality, and it appears from his affidavit that summonses in the Police Court have been taken out against him for his keeping buffaloes without license in the said stables.

On the 29th June, 1903, Mr. Harvey, the Municipal Commissioner, put in his affidavit, the material portion of which is paragraph 6, in which he says that he has satisfied himself from his own inspection and knowledge of the petitioner's stables and from the reports of the Health Department and Superintendent of Licenses that the grounds of objections stated in Exhibits B and C to the applicant's affidavit do exist with regard to both the stables; that he has also consulted the Executive Health Officer on the subject, and is of opinion that the petitioner's licenses in respect of the stables ought not to be renewed, and has therefore declined to renew the same, ample time having been given to the applicant to provide himself with other accommodation for his animals.

The question that now arises is whether having regard to sections 394 and 479 of the City of Bombay Municipal Act, 1888, the Municipal Commissioner has a discretion to grant licenses in respect of buffalo-stables.

1903.

HAJI ISMAIL

v.

THE
MUNICIPAL
COMMISSIONER OF
BOMBAY.AHMED
MOOSA

v.

THE
MUNICIPAL
COMMISSIONER OF
BOMBAY.

1913

HAJI ISMAIL

v.

THE

MUNICIPAL
COMMISSIONER OF
BOMBAY.

AHMED

MOOSA

v.

THE

MUNICIPAL
COMMISSIONER OF
BOMBAY.

Section 394 comes within Chapter XV which contains sanitary provisions regarding the City of Bombay. The material words in section 394 are: "No person shall use any premises for keeping cattle without or otherwise than in conformity with the terms of a license granted by the Commissioner in this behalf."

Now in the first place there are no words in this section to the effect that "the Commissioner shall grant the license," and reading the commencement of section 479 "Whenever it is provided in this Act that a license or a written permission may be given for any purpose," I am of opinion that the words in section 394 "license granted" are equivalent to "license which may be granted."

The well-known eating-house case, *Rustom J. Irani v. H. Kennedy*⁽¹⁾, was relied upon by Mr. Raikes on behalf of the petitioner. But I am of opinion, having read that judgment carefully through again, that that case does not support the applicant's contention, and in fact contains several passages which are strongly against it.

I can find no section which compels the Municipal Commissioner to renew licenses of buffalo-stables, and it is impossible to suppose that he could be intended to be compelled to do so, having regard to the changes which may or must take place with regard to their surroundings. Once a buffalo-stable is not always a buffalo-stable, and there is nothing in the Municipal Act to say that it must be.

I therefore discharge the rule with costs.

In Ahmed Moosa's case his Lordship did not deliver a separate judgment as he held it was not distinguishable on the facts.

The applicants appealed.

Davar for appellant in Haji Ismail's case.

Robertson for appellant in Ahmed Moosa's case.

Scott (Advocate General) and *Lowndes* for the respondent in both the appeals.

Their Lordships dismissed the appeals.

(1) (1901) 26 Bom. 396; 4 Bom. L. R. 1.

The judgment of the Court was delivered by

CHANDAVARKAR, J. :—It is true, as contended by Mr. Davar and Mr. Robertson in these appeals which have been heard together, that the City of Bombay Municipal Act does not say in so many words that it is within the competence of the Municipal Commissioner either to grant or to withhold a license for the purposes of milch-cattle stables as he in his discretion thinks fit. However, if we compare together the sections of the Act dealing with licenses or "the written permission of the Commissioner," the discretionary power of the Commissioner appears, in our opinion, to follow by necessary implication. Section 479 says that whenever it is provided in this Act that a license or a written permission "may be given for any purpose," such license or written permission shall specify the conditions, &c., on which they are granted. This section taken by itself throws no light on the construction of section 394 upon which the decision here turns. Had that section stood alone, it might have been possible to construe the words "may be given" as a mere recital, not as conveying the meaning that a license may be refused in any given case, if the Municipal Commissioner think fit. But there are other sections in the Act which show that wherever the Legislature intended that the power of refusal to grant a license or a written permission should be restricted they have distinctly said so and specified the conditions of restriction. For instance, in section 390, after providing :—"No person shall newly establish in any premises any factory, workshop or workplace in which it is intended that steam, water or other mechanical power shall be employed, without the previous written permission of the Commissioner," the Legislature go on to say :—"The Commissioner may refuse to give such permission if he shall be of opinion that the establishment of such factory, workshop or workplace in the proposed position is objectionable by reason of the density of the population in the neighbourhood thereof or will be a nuisance to the inhabitants of the neighbourhood." It may no doubt be urged as to this section that the power of giving a written permission vested in the Commissioner is obligatory under the 1st clause and that the 2nd clause creates merely an exception

1903.

Haji Ismail
v.
The
Municipal
Commis-
sioner of
Bombay.

Ahmed
Moosa
v.
The
Municipal
Commis-
sioner of
Bombay.

1903.

HAJI ISMAIL

OF

THE
MUNICIPAL
COMMISSIONER OF
BOMBAYAKMED
MOOSA

OF

THE
MUNICIPAL
COMMISSIONER OF
BOMBAY.

specifying those cases where alone the Commissioner can decline to exercise the power. But then we have section 402 under which the opening of new private markets "for the sale of, or for the purpose of exposing for sale, animals intended for human food or any other article of human food" is prohibited "except with the sanction of the Commissioner," and it is provided that in giving such sanction the Commissioner shall be guided by the decisions of the Corporation at the time in force under sub-section I. Here the Legislature have imposed a restriction on the Commissioner's power to sanction the opening of new private markets, implying thereby that it is a power to grant or refuse the sanction, subject to the restriction specified. But it is section 403 of the Act which furnishes a clearer clue to the meaning of section 394. Section 394 relates to licenses for using any premises for carrying on certain trades whereas section 403 relates to licenses for certain other purposes. The 1st clause of section 403 provides that no person shall do the acts therein specified "without or otherwise than in conformity with the terms of a license granted by the Commissioner in this behalf." These latter words as to the necessity of a license occur also in the 1st clause of section 394, with the construction of which we are now concerned. There is a proviso, however, to section 403, according to which the Municipal Commissioner "shall not refuse" a license for one of the three purposes mentioned in clause 1—*viz.*, the keeping open a private market—except in the cases specified in the proviso. This restriction imposed on the Commissioner's power to grant a license for keeping open a private market shows that the power to grant licenses vested in the Commissioner by the words "without or otherwise than in conformity with the terms of a license granted by the Commissioner in this behalf"—*i. e.*, for the purpose of a private market and for the two other purposes mentioned in clause 1 of section 403—was intended by the Legislature to include the power of refusal subject to the condition that the power of refusal shall be restricted in the case of licenses for keeping open private markets. There is no such restriction imposed on the power to grant licenses given in exactly the same words to the Commissioner in section 394 of the Act. It is clear, therefore, that the Legislature intended the

power to grant licenses, whether under section 394 or under section 403 to include the power to refuse them—in other words, it is a purely discretionary power.

It was urged before us that we should avoid this construction of section 394, if we can, because, it was said, such a construction has the effect of arming the Municipal Commissioner with the arbitrary power of prohibiting a man from carrying on a legitimate trade. It is not quite accurate to say that section 394 arms the Commissioner with any such arbitrary power. Upon the construction which, we think, ought to be put upon it, all it does is to prohibit a man from carrying on the trades specified in the section "in any premises." The power is restricted as to place. The object is to prevent a particular locality in any congested part of the city from becoming insanitary by reason of trades which, in the opinion of the Legislature, are injurious to health. Then it was said that section 394 occurred in a chapter, which was headed "Regulation of Factories, Trades, &c." and that the "regulation" of a trade in any premises by means of licenses could not mean the prohibition of that trade there. This argument seems at first sight to derive some force from the decision of the Privy Council in *Municipal Corporation of the City of Toronto v. Virgo* ⁽¹⁾ where Lord Davey, delivering the judgment of their Lordships, said that, "there is marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed" and "that a Municipal power of regulation or of making by-laws for good government, without express words of prohibition, does not authorize the making it unlawful to carry on a lawful trade in a lawful manner." It was argued in that case that the by-law impugned there did not amount to prohibition because the persons prohibited could still carry on their business "in certain streets of the city." But their Lordships would not accede to that argument, because "the effect of the by-law is practically to deprive the residents of what is admittedly the most important part of the city of buying

1903.

HAJI ISMAIL

v.

THE
MUNICIPAL
COMMIS-
SIONER OF
BOMBAY.AHMED
MOOSA

v.

THE
MUNICIPAL
COMMIS-
SIONER OF
BOMBAY.

(1) (1896) A. C. 88 at pp. 93, 94.

1903.
 HAJI ISMAIL
 v.
 THE
 MUNICIPAL
 COMMISSIONER OF
 BOMBAY.
 —
 AHMED
 MOOSA
 v.
 THE
 MUNICIPAL
 COMMISSIONER OF
 BOMBAY.

their goods of or of trading with the class of traders in question." But there are also passages in this judgment of the Privy Council which support the view that the power to regulate a trade may, in certain cases, amount to a power of prohibition in the sense of restricting that trade to a certain place or places. As was said there:—"No doubt the regulation and governance of a trade may involve the imposition of restrictions in its exercise both as to time and to a certain extent as to place where such restrictions are in the opinion of the public authority necessary to prevent a nuisance or for the maintenance of order." Upon the construction of the different sections of the Act there concerned, their Lordships held that the power to regulate did not imply a power to prohibit or prevent, because "when the Legislature intended to give power to prevent or prohibit it did so by express words;" and further that there was no question of apprehended nuisance raised in the case. That cannot be said of the City of Bombay Municipal Act. It is further to be observed that this judgment of the Privy Council in *Municipal Corporation of the City of Toronto v. Virgo*⁽¹⁾ was relied upon by Lord Shand in support of his view, dissenting from the other Lords, in *Scott v. Glasgow Corporation*⁽²⁾, where the question was whether a by-law made by the Corporation prohibiting sellers of goods in a public market from limiting the class of purchasers with whom they meant to deal was *ultra vires* of the Corporation as fettering the common law right of every man to sell his goods to whom he liked. Lord Shand held on the authority of the Privy Council judgment that it was, but it is clear from his dissenting judgment that the by-law would have been valid and within the jurisdiction of the Corporation who made it, if it could have been shown that it was required on account of "any risk of disease" or "any want of suitable accommodation."

The power, then, to grant licenses vested in the Municipal Commissioner under section 394 being purely discretionary, the only limit to its exercise is that it should not be arbitrary, vague and fanciful; but it must be legal and regular. The Commissioner's refusal to grant a license for milch-cattle stables to the appellant in appeal No. 1298 has been impugned before us on

(1) (1896) A. C. 88.

(2) (1899) A. C. 470.

these grounds. It is urged that the premises in dispute have been used as milch-cattle stables for 60 years, that they have never occasioned any nuisance and that the present complaint that they are a source of nuisance is due to the hostility of Devji Kanji and his son Sheriff Dewji. It appears from the affidavits put in that the appellant has gone to considerable expense on account of these stables. It may be a hard case, but the question is whether the Court can substitute its judgment for that of the Municipal Commissioner, who is by law the authority to decide whether a license should be granted or not. Unless it is clear beyond doubt that the Municipal Commissioner is using his authority with some indirect motive and for a collateral purpose, not for the purpose for which the Legislature has armed him with the power, we cannot interfere with his discretion. In the words of Lord Bramwell in *Sharp v. Wakefield*⁽¹⁾ "the hardship of stopping the trade of a man who is getting an honest living in a lawful trade, and has done so, perhaps, for years, with probably an expense at the outset, may well be taken into consideration; but it must be done so in conjunction with considerations the other way, and must be left to the discretion of the Justices." Here the discretion is left by law to the Municipal Commissioner and we are not satisfied that he has exercised it arbitrarily and without any regard to the sanitary interests of the City for which the power is vested in him.

These considerations also apply to appeal No. 1299 with this difference that in that appeal there has been no refusal to grant a license but the Commissioner has declined to grant one for more than 100 buffaloes whereas the appellant wants a license for 600. This is, strictly speaking, not a case of refusal but one where a term of the license which the Commissioner is willing to grant is impugned as beyond his powers. But that also is a question of discretion and we must decline to interfere with it for the reasons already given for our decision in the other appeal.

The result is that the orders of Russell, J., in both the appeals are confirmed with costs.

Orders confirmed.

1903.

HAFI ISMAIL

v.

THE
MUNICIPAL
COMMISSIONER
OF
BOMBAY.

—
AHMED
MOOSA

v.
THE
MUNICIPAL
COMMISSIONER
OF
BOMBAY.

⁽¹⁾ (1891) A. C. 173, at p. 183.

1903.

Haji Ismail
v.
The
Municipal
Commissioner of
Bombay.
—
Ahmed
Moosa
v.
The
Municipal
Commissioner of
Bombay.

Appeal No. 1298.

Attorneys for the appellant: Messrs. *Khanderao S. and L.*Attorneys for the respondent: Messrs. *Crawford Brown & Co.*

Appeal No. 1299.

Attorneys for the appellants: Messrs. *Bicknell, Merwanji and Motilal.*Attorneys for the respondent: Messrs. *Crawford Brown & Co.*

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Aston.

1903.

December 1.

JAMNA (ORIGINAL PLAINTIFF), APPLICANT, v. JAGA BHANA AND ANOTHER (ORIGINAL DEFENDANTS), OPPONENTS.*

* *Limitation Act (XV of 1877), section 20—Part payment—Statement in writing not in debtor's hand—Debtor's mark beneath—Limitation.*

The condition prescribed by section 20 of the Limitation Act XV of 1877 that part-payment of the principal debt should appear in the handwriting of the person making the same is satisfied if the payer affixes his mark beneath an endorsement not written by him.

APPLICATION under the extraordinary jurisdiction (section 25 of the Provincial Small Cause Courts' Act IX of 1887) against the decision of Mohanrai D. Desai, Subordinate Judge of Bulsar, in the Surat District, in Small Cause Suit No. 162 of 1903.

The plaintiff sued in the beginning of the year 1903 to recover rupees fifteen in the Court of the Subordinate Judge of Bulsar in his Small Cause jurisdiction basing his claim on a *khata* passed in his favour by the defendants Jaga Bhana and Kika Bhana on the 21st November, 1899. The plaintiff, in order to save the bar of limitation, relied on a part-payment of rupees four made by Kika Bhana on the 5th February, 1900. The part-payment was written by one Jivan Kessur and Kika Bhana had made his mark beneath the writing.

The defendants denied the *khata* and the part-payment and pleaded the bar of limitation.

* Application No. 175 of 1903 under the Extraordinary Jurisdiction.

1903.

JAMNA
v.
JAGA
BHANA.

The Subordinate Judge dismissed the suit as time-barred. He held, relying on *Joshi Bhaishankar v. Bai Parvati*⁽¹⁾, that though the part-payment was made by one of the debtors, the endorsement about the payment being in the handwriting of a different person, such payment did not fulfil the requirements of the proviso to section 20 of the Limitation Act. The Subordinate Judge was further of opinion that the rulings of the Madras High Court in *Sesha v. Seshaya*⁽²⁾ and *Ellappa v. Annamali*⁽³⁾ were not obviously approved by the Bombay High Court in the case above quoted.

The plaintiff applied under the extraordinary jurisdiction (section 25 of the Provincial Small Cause Courts' Act IX of 1887) urging *inter alia* that the Judge erred in holding that the claim was time-barred, that he misunderstood the provision of the Limitation Act (XV of 1877), that he erred in relying on the decision in *Joshi Bhaishankar v. Bai Parvati*⁽¹⁾, and that he was wrong in thinking that the Madras rulings mentioned above were not approved of by the Bombay High Court. A *rule nisi* having been issued calling on the defendants to show cause why the Judge's decision should not be set aside,

N. K. Desai appeared for the applicant (plaintiff) in support of the rule.

There was no appearance on behalf of the opponents to show cause.

JENKINS, C. J.:—The question raised before us is whether the part-payment of the principal of the debt in suit created a new period of limitation. To ensure that consequence section 20 of the Limitation Act requires that the fact of the payment should appear in the handwriting of the person making the same. In this case there is a statement in writing of the fact of payment, but not written by the debtor's hand. It is however contended that the fact of the payment appears in the debtor's handwriting inasmuch as he has placed his mark beneath it, and we have to adjudicate on the correctness of this contention. More than 20 years ago it was decided by two separate benches of the Madras

(1) (1901) 26 Bom. 246.

(2) (1883) 7 Mad. 55.

(3) (1883) 7 Mad. 76.

1903.

JAMINA

v.

JAGA
BHANA.

High Court that the affixing of a mark, as in this case, was a sufficient compliance with the Act, and it would appear that this view was shared by other learned Judges of that Court : *Sesha v. Seshaya*⁽¹⁾ and *Ellappa Nayak v. Annamalai*⁽²⁾. The reported cases disclose no subsequent dissent from these decisions, though they have been distinguished on more than one occasion. Were the matter *res integra* we might have felt difficulty in arriving at the same conclusion, but it is of paramount importance that in those matters, which enter into the daily life of the people, a long settled rule of law should not lightly be disturbed, merely because it may not fit in with the individual opinion of a Judge or Bench before whom it may come for consideration. It is true that according to prevailing notions, the Courts of one Presidency do not regard themselves as bound by decisions of another even on question of universal application—a matter on which perhaps some day a more satisfactory understanding may prevail—still we think we ought, under the circumstances, to be guided by the Madras decisions which completely cover the point before us.

On this ground therefore we hold the suit is not barred.

Order accordingly.

(1) (1883) 7 Mad. 55.

(2) (1883) 7 Mad. 76.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Aston.

1903.

December 9.

MANILAL UMEDRAM AND OTHERS (ORIGINAL JUDGMENT-CREDITORS),
APPLICANTS, v. NANABHAI MANEKLAL AND OTHERS (ORIGINAL
OPPOSING DECREE-HOLDERS), OPPOSITIONS.*

*Civil Procedure Code (Act XIV of 1882), section 295—Rateable
distribution—Realization of assets—Interpretation.*

A certain sum of money, which was deposited in a Bank in the joint names of the Collector and a judgment-debtor, and which belonged to the judgment-debtor, was sent by the Collector in the form of a cheque to the Court at the request of the Court to which the judgment-creditor had applied for the payment of his decretal amount out of the said money. After the cheque was

* Application No. 96 of 1903 under the extraordinary jurisdiction.

received by the Court and converted into cash, the judgment-creditor contended that the money was not liable to rateable distribution under section 295 of the Civil Procedure Code (Act XIV of 1882), between certain other judgment-creditors of the judgment-debtor, because the money did not fall within the description of assets dealt with in that section, that is, it could not be said that those assets had been realized, and if they had been realized, they had not been realized in execution of a decree inasmuch as the money had not been attached in the Bank.

Held, that section 295 of the Civil Procedure Code (Act XIV of 1882) applied and that the money was liable to rateable distribution between the several judgment-creditors. Section 295 provides that whenever assets are realized by sale or otherwise in execution of a decree, the consequences prescribed in the section shall follow.

Primâ facie the word "realized" means "converted into cash or into a form whereby it becomes available for immediate distribution" and there is nothing in the word itself which requires that that process should take place as the result of any ulterior proceeding in the course of execution.

APPLICATION under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) against the order of L. P. Parekh, First Class Subordinate Judge of Surat, in an execution proceeding.

Point as to the rateable distribution of assets realized under section 295 of the Civil Procedure Code (Act XIV of 1882).

On the 23rd January, 1903, the plaintiffs Manilal Umedram and his two brothers obtained a decree (No. 201 of 1902) against their debtor Zulfikaralli in the Court of the First Class Subordinate Judge of Surat for Rs. 14,372-8-9. On the 3rd February following, the plaintiffs applied, under darkhast No. 28 of 1903, for the execution of the said decree, praying among other things for an order under section 272 of the Civil Procedure Code (Act XIV of 1882) directing the payment of the decretal amount to them out of the sum of Rs. 23,000 which, they were informed, was deposited by the defendant with the Collector of Surat, and on the same date the Court sent to the Collector a prohibitory order accompanied with a letter. The Collector on the 6th February, 1903, returned the prohibitory order with a letter stating that the judgment-debtor's estate was not in his control. Thereupon, on the 7th February the plaintiffs presented an application to the Court and prayed for an order directing the Collector to pay the attached amount to them under section 277

1903.

MANILAL
UMEDRAM
v.
NANABHAI
MANEKDAL.

1903.

MANILAL
UMEDRAM
v.
NANABHAI
MANEKLAL.

of the Code. But the Court declined to pass such an order at that stage and addressed a further letter to the Collector, who, by his reply dated the 11th February, 1903, accepted finally the prohibitory order, and the Court on the 14th February directed that a notice be issued to the judgment-debtor requiring him to pay the decretal amount within a fortnight, and that, on his default, the Collector would be asked to pay the amount. On the 2nd March, 1903, the judgment-debtor applied for stay of execution for a month and a half on the ground that he was unable to make the payment, his property being then not in his control. The Collector also supported the judgment-debtor's application, but the Court rejected the application and on the 3rd March wrote a letter to the Collector asking him to send the decretal amount. On the 5th March the plaintiff again applied to the Court for an order on the Collector for the payment of the amount to them, but the Court declined to make the order on the ground that the rights of other decree-holders, who had in the meanwhile applied for execution of their decrees, had to be considered. On the 6th March the Collector wrote a letter to the Court inquiring whether execution was levied by attaching the judgment-debtor's money which was lying in the Bank of Bombay in the joint names of the Collector and the judgment-debtor and expressing his willingness to sign the order for the withdrawal of the said money if the judgment-debtor permitted him to do so. But before the said letter was received by the Court, the plaintiffs on the 6th March, 1903, made an oral application to the Court for the payment of the money jointly to all decree-holders who had up to that date presented applications for the execution of their decrees. The Court declined to do anything in the matter till a reply from the Collector was received. On the 9th March the plaintiffs applied reiterating their prayer for an order on the Collector for the payment of the decretal amount to them and undertook to give security for the claims of the other decree-holders who had applied for execution. The Court made no order on the said application, but made an order on the original application for execution dated the 3rd February, 1903, to the effect that a letter be written to the Collector requesting him to send a cheque for the decretal amount payable to the Nazir of the Court, and a letter to the said effect was sent to the Collector on the 10th March follow-

ing. The Collector on the 18th March sent a cheque for Rs. 15,623-11-3, that being the amount payable under the decree to the Nazir. The cheque was received by the Court on the 20th and it was cashed on the 23rd March. On the 24th March, 1903, the plaintiffs applied for subpoenas to the Collector and the Manager of the Bombay Bank for their examination to show that the payment made by the Collector was a voluntary payment by the judgment-debtor and, therefore, it would not fall under section 295 of the Civil Procedure Code. The Court merely recorded this application. On the 4th April, 1903, the day to which the hearing was postponed, the plaintiffs presented a further application submitting that the Collector had sent the amount as the agent, and with the sanction, of the judgment-debtor out of the funds lying in the Bank of Bombay in the joint names of the Collector and the judgment-debtor and not out of the monies in the hands of the Collector that were attached and that, therefore, section 295 of the Civil Procedure Code was not applicable and the other decree-holders were not entitled to rateable distribution of the said amount. But the Court overruled the plaintiffs' contention and ordered rateable distribution of the amount between decree-holders who had presented their darkhasts before the 20th March, 1903. The Court made a remark that it was not necessary to examine the Collector.

The plaintiffs applied under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) urging *inter alia* that the Court acted without jurisdiction, illegally and with material irregularity; that the Court wrongly declined jurisdiction in refusing to pass an order under section 277 of the Civil Procedure Code, which was repeatedly asked for; that the Court had no jurisdiction under the circumstances of the case to apply section 295 of the Code; that the Court erred in holding that the monies sent by the Collector were realized in execution of the decree so as to fall under section 295: that the Court should have held that the Collector made the payment on behalf of the judgment-debtor in satisfaction of the decree; that the Court acted illegally and with material irregularity in refusing an opportunity to the applicants (plaintiffs) to adduce evidence in support of their contention that section 295 was not applicable

1903.

MANILAL
UNEDRAM
v.
NANABHAI
MANEKDAL.

1908.

MANILAL
UMEDRAM
v.NANABHAI
MANEKJI.

to the circumstances of the case; and that in any event the Court erred in ordering rateable distribution to all decree-holders who had applied for execution before the 20th March 1903. A *rule nisi* was issued calling on the opposing decree-holders to show cause why the order of the Court should not be set aside.

Setalvad (with *K. M. Jhaveri*) appeared for the applicants (plaintiffs) in support of the rule:—Our first contention is that section 295 of the Civil Procedure Code is not applicable and that the Court had no jurisdiction to pass the order for rateable distribution. Our next contention is that the Court ought to have given us an opportunity to prove that the payment was a voluntary payment made by the judgment-debtor. Rateable distribution can be allowed only when the amount was realized by the Court under some process in execution and not otherwise. In the present case the money that came into Court was not attached. The money which was in the hands of the Collector was attached and not that which was deposited in the Bombay Bank. The money was not realized by sale or other process in execution proceedings. Further mere attachment would not make the money available for payment under section 295 of the Civil Procedure Code. There must be a further step, namely, realization in execution. The money being already in the hands of the Collector or in the Bank, it did not go to him in execution of the decree. Under the prohibitory order the Collector merely retained the money which was already in his hands.

[JENKINS, C. J.—Take the case of a judgment-debtor depositing money in Court.]

We submit that if he deposits the money in Court under the order of the Court, then it would be a deposit in execution proceedings. But in the present case the money had not come to the Court in that manner. The Bombay Bank was the debtor of the judgment-debtor and if the money had been attached while it was in the Bank, then section 295 would have applied. The Collector was not the judgment-debtor, therefore, the payment by the Collector was a voluntary payment: *Purshotamdass Tribhovandass v. Mahanant Surajbharthi*⁽¹⁾.

(1) (1882) 6 Bom. 538.

[JENKINS, C. J.—Would not section 295 of the Code be applicable to a payment made into Court by a receiver?]

We submit that the appointment of a receiver is a process in execution. The money must be realized in execution under the provisions of the Code and not otherwise: *Finck v. Maharaj Bahadoor Sing*⁽¹⁾. The word "otherwise" in section 295 means some process recognized by the Civil Procedure Code. *Ganga Din v. Khushali*,⁽²⁾ shows that though the property of the judgment-debtor was attached still he made a voluntary payment. See also *Gopal Dai v. Chunni Lal*⁽³⁾, *Sew Bux Bogla v. Shib Chunder Sen*⁽⁴⁾, *Prosonno Moyi Dassi v. Sreenauth Roy*⁽⁵⁾. The letters written by the Court to the Collector cannot be considered to be in the nature of any process known to the Civil Procedure Code. The Collector and the Manager of the Bank being not examined we are in the dark with respect to the circumstances under which the payment was made.

Supposing that section 295 is applicable, then the realization must be taken to have been effected on the date of the attachment. The money in the hands of the Collector was money in the hands of the judgment-debtor. Though the money was originally in the Bank when the order for attachment was made, still it was not in the Bank when it was actually attached. Therefore it could not be attached in the hands of the Collector by virtue of any legal process under the Code.

[JENKINS, C. J.—Has the cheque been cashed?]

It has been cashed and the money stands to the credit of the Court, but the money has not come to Court under any process known to the Code.

Further the persons entitled to come in for rateable distribution are decree-holders Nos. 78 and 84 only. Decree-holders Nos. 68, 69, 70 and 75 are not entitled to come in because at their instance no process had been issued under section 248 of the Civil Procedure Code, their decrees being more than one year old. The procedure under section 248 is not merely a matter of form. It is a procedure which must be gone through.

(1) (1899) 26 Cal. 772.

(3) (1885) 8 All. 67.

(2) (1885) 7 All. 702.

(4) (1886) 13 Cal. 225.

(5) (1894) 21 Cal. 809, 817.

1903.

MANILAL
UMEDRAM
v.
NANABHAI
MANEKLAL.

[JENKINS, C. J.—The Privy Council have held that so far as strangers are concerned the procedure under section 248 is not compulsory.]

Some of the applicants (decree-holders) for rateable distribution have merely put in applications under section 248, but have taken no further steps, such as payment of process fee, issue of notices, etc. Such applicants cannot take the benefit of section 295. These remarks apply to decree-holder No. 73. The application under section 248 must be such an application as is subsisting.

Goculdas K. Parekh for the opponent 9 (decree-holder No. 73).—Under the penultimate clause of section 295 of the Civil Procedure Code, the applicants can have their remedy by a separate suit.

So far as the question of evidence is concerned it has taken a new turn here. In the Lower Court it was stated that the applicant wanted to examine the Collector and the Manager of the Bank for the purpose of ascertaining the terms under which the money was deposited and to produce certain correspondence. No question was distinctly raised in the Lower Court as to whether the payment was voluntary.

As no process was issued against the Bank it was urged that the procedure adopted was irregular. But the applicants themselves brought about the irregularity, if any, and they cannot now turn round and say that they are entitled to the benefit of that irregularity. If the procedure was, according to their contention, irregular, they must take the consequences. The irregularity, however, would not absolve the money from its liability to rateable distribution. The Collector was asked by the Court to send in the money and he did so. Therefore the money came to the Court in execution process and consequently it was liable to rateable distribution under section 295 of the Code. A mere prohibitory order is not a final order under section 272. That section requires something more to be done and the money was brought into Court under the provisions of that section.

It was further contended that the money was not realized in a manner which would make section 295 applicable and certain

decisions were relied on. But those decisions are distinguishable. The payments therein referred to were not made under any process aimed at the money. In *Purshotamdass v. Mahanant Surajbharthi*⁽¹⁾ the money was paid under arrest. In *Fink v. Maharaj Bahadoor Sing*⁽²⁾ rents were realized by a receiver and in *Prosonno Moyi Dassi v. Sreenauth Roy*⁽³⁾ there was a sale by private agreement. We rely on *Sorabji E. Warden v. Govind Ramji*⁽⁴⁾, *Srinivasa Ayyangar v. Seetharamayyar*,⁽⁵⁾ and *Vishvanath Maheshwar v. Virchand Panachand*⁽⁶⁾. The last ruling is on all fours with this case. The prohibitory order is always subject to another order by the Court. What is to be taken into consideration is the stage at which the money goes into Court: *Bidhoo Beebee v. Keshub Chunder*⁽⁷⁾, *Fink v. Maharaj Bahadoor Sing*⁽²⁾. Long before the money came into Court, applications for the attachment of the money were pending in the Court.

As to the objection under section 248 of the Civil Procedure Code:—Our application for attachment was made on the 16th March and the cheque was cashed on the 23rd March, 1903. The application was for the attachment of the money lying in the Bombay Bank in the names of the judgment-debtor and the Collector. The Court passed the order for attachment, but before the process fee was paid in, the money came into Court. It was, therefore, not necessary for us to take any further steps. Our application was, therefore a good application. We made a second application with reference to the balance that was left in the Bank.

Manmukhram K. Mehta for opponents 1, 3, 4 and 5 (decree-holders Nos. 248, 68 and 69):—We adopt the argument advanced on behalf of opponent 9 in connection with section 295 of the Civil Procedure Code.

On the 6th March, 1903, the applicants (plaintiffs) made an application to the Court below that they were willing to take the money on behalf of all the decree-holders who had appeared. It was only on the 28th March that they changed their mind and

(1) (1882) 6 Bom. 588.

(2) (1899) 26 Cal. 772.

(3) (1894) 21 Cal. 809.

(4) (1891) 16 Bom. 91.

(5) (1895) 19 Mad. 72.

(6) (1881) 6 Bom. 16.

(7) (1868) 9 W. R. 462.

1903.

MANILAL
UMEDRAM
v.
NANABHAI
MANEKJI LAL.

1903.

MANILAL
UMEDRAM
v.NANABHAI
MANEKJI.

applied to the Court for subpoenas to the Collector and the Manager of the Bank. It was in the discretion of the Court to grant or refuse such an application.

Under section 248 notices were issued to the judgment-debtor, but he did not appear and the Court ordered rateable distribution.

Setatrad in reply.—What was paid into Court was money not attached. Therefore the payment was a voluntary payment to which section 295 would not apply. What was attached was money standing in the names of the Collector and the judgment-debtor. It did not come into Court by way of realization under the decree.

The payment must be taken to have been made on the day the Court received the cheque, that is, on the 20th March: *Bhagvandas Kishordas v. Abdul Husein Mahomed Ali*⁽¹⁾.

There may be a remedy by suit, but that is no reason why we should not come up under the extraordinary jurisdiction if the Court below has failed to exercise its jurisdiction and has acted with material irregularity in shutting out our evidence: *Tiruchittambala Chetti v. Seshayyengar*⁽²⁾.

JENKINS, C. J.—The only question we have to decide in this case is, whether on the facts disclosed we should be justified in setting aside, under section 622 of the Civil Procedure Code, the order of the Subordinate Judge, who has directed a distribution, under section 295 of the Civil Procedure Code, of assets held by it.

The petitioners have obtained a decree against Mr. Zulfi-karally and they contend that a sum of money, which has been paid into Court, ought not to have been distributed under section 295, but should have been paid to them exclusively. They maintain that the sum of money which is in Court does not fall within the description of assets dealt with in section 295, because, in the first place (they argue), it cannot be said that those assets have been realized, and, in the next place, even if they have been realized, they have not been realized in execution of a decree.

(1) (1878) 3 Bom. 49.

(2) (1881) 4 Mad. 383.

The circumstances under which the assets in dispute came into Court are briefly these. The present petitioners, believing that the Collector had in his hands money belonging to the judgment-debtor, applied for an attachment of that money by proceedings under section 272, Civil Procedure Code, and they further asked for a direction for payment to them of their decretal amount out of the sum of money which, (as they alleged) they were informed and believed, was deposited with the Collector by the judgment-debtor. An order was passed on that occasion, but it did not bear any immediate fruit. Subsequently the Collector wrote to the Judge asking whether the attachment was levied against certain moneys that were deposited in the Bank of Bombay. The Collector intimated not only that the moneys were deposited in the Bank of Bombay in the joint names of the Collector and the judgment-debtor, but also that he was willing to sign the order for the withdrawal of the money if the judgment-debtor permitted him to do so.

The petitioners then applied for an order on the Collector to pay them the decretal amount and the Court directed that a letter be written to the Collector requesting him to send the cheque for the decretal amount to the Court payable to the Nazir of the Court. On the 10th of March a letter in those terms was sent to the Collector.

On the 18th March the Collector sent a cheque for Rs. 15,623-11-0, payable to the Nazir of the Court, that being the amount of the petitioners' decree, and it is that sum with which we are now concerned.

We have passed over some intermediate stages of the proceedings which led up to the payment of that sum ; but we have stated enough to indicate the circumstances under which it was paid, and we have now to determine whether the Judge in directing a distribution under section 295 has fallen into an error that would justify us in exercising our revisional jurisdiction.

First then can it be said that there has been no realization ?

What the section provides is that whenever assets are realized by sale or otherwise in execution of a decree, the consequences prescribed in the section shall follow.

1903.

MANILAL
UNEDRAM
v.
NANABHAI
MANEKJI.

1903.

MANILAL
UMEDRAM
v.
NANABHAI
MANEKJI.

Prima facie the word "realized" implies that property has been converted into or obtained in cash or some other form available for immediate distribution, and there is nothing in the word itself which requires that that process should take place as the result of any ulterior proceeding in the course of execution. So that, if we take the word "realized" alone, it is insufficient to bear the burden that the petitioners would place on it. But then it is said it has not been realized in execution, because the cash came into Court as a result of orders which were not properly made having regard to the circumstances which have since been disclosed.

The line of argument is briefly this: inasmuch as the money was not in the hands of the Collector but was standing to the credit of the Collector and the judgment-debtor in the Bank of Bombay, any order under section 272 should have been directed not against the Collector but against the Bank. But it is quite clear that an order under section 272 is an order in execution, and section 272 contemplates that the Court should not only direct notice to issue, but should pass further orders in the matter.

The Subordinate Judge acting (as he appears to us to have acted) under section 272, whether rightly or wrongly, ordered the letter to be written to the Collector which resulted in the payment into Court of this sum of Rs. 15,623-11-0. How can it with fairness be said by the present petitioners that that money was not brought in in execution?

There is a general principle that a litigant must act throughout consistently with the position he has taken up in the litigation in which he is engaged.

Here these petitioners have been enabled by an order of the Court, purporting to have been passed in execution at their own instance, to obtain payment into Court of a sum of money, and now they come and ask us to say that it was not paid in execution.

We do not think that we ought under section 622 to listen for a moment to such a suggestion. We think that if there has been any irregularity (we are not at present deciding that there was) it was an irregularity occasioned by the petitioners themselves, and an irregularity out of which they have gained most

substantial advantage, so that we should be putting section 622 to a purpose for which it is never intended, if we gave effect to the contention they have urged before us.

We are not forgetful of the case of *Purshotamdass Tribhovan-dass v. Mahánant Surajbharthi Haribharthi*,⁽¹⁾ and the many other cases that have been brought to our notice; but it is enough for us to say that they appear to us to be absolutely foreign to the present case. By way of example we may take the case of *Purshotamdass v. Mahánant Surajbharthi*,⁽¹⁾ where a judgment-debtor paid off an execution against his person and in return secured his release. The decree-holder was master of the position and the only reasonable interpretation, we think, to be put on that case was that the decree-holder accepted that sum of money as the only term on which he would be a party to the release of the judgment-debtor.

We may remark in passing in reference to that case that so far as the record discloses it does not appear that it came in strictness within section 295 at all, because from the reference as cited in the report it does not seem that the assets were held by the Court. But be that as it may, the circumstances to which we have alluded show there is a broad and fundamental distinction between that case and the present.

It is made a matter of grievance by the petitioners that they were not allowed to call the Bank Manager and the Collector, but we think the Judge exercised a wise discretion in the matter.

So much for the general questions; it only now remains to notice very shortly the particular objections urged against the participation in this distribution of individual creditors. First it is said that the decree-holder No. 73, who is the ninth respondent, is not entitled to share, because there was no effective application for execution made by him at the time when the realization took place. But we think that the answer to that is to be found in the application of the 16th March, 1903, which was a clear application for execution of the decree though *bhatta* was not paid.

The objection urged against the other decree-holders, who have been distinguished before us by Nos. 68, 69, 70 and 78, is

1903.

MANILAL
UMEDRAM
v.
NANABHAI
MANERLAL.

(1) (1882) 6 Bom. 588.

1933.

MANILAL
UMEDRAM
v.
NANABHAI
MANEKDAL.

that the provisions of section 248, Civil Procedure Code, have not been complied with, but it is clearly shown that in the case of Nos. 68 and 69 there is no ground for this suggestion and we cannot on the record before us find anything which entitles us to say that the Judge has committed any error with regard to Nos. 70 and 75.

The result is that the rule must be discharged with costs.

Rule discharged.

APPELLATE CIVIL.

Before Sir I. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Aston.

1903.

December 15.

THE SECRETARY OF STATE FOR INDIA (ORIGINAL DEFENDANT)
APPELLANT, v. HAIBATRAO HARI AND OTHERS (ORIGINAL PLAINTIFFS),
RESPONDENTS.*

Inámdár—Dasname Sanyasi and Gosavi Zundivale—Kadim (ancient) haks—Escheat—Corporate body—Fluctuating communities—Duty of the Court, if possible, to find legal origin of existing facts.

The plaintiffs, whose title as Inámdárs of a village dated back to 1762, sued on the strength of their title as Inámdárs to recover, on account of certain haks, a sum of money which they alleged was due to them and was wrongly taken by the defendant. The defendant alleged that the haks were *Kadim* (ancient, *i. e.*, which came into existence prior to the Inám grant of the village to the plaintiffs' ancestors) and had escheated to Government. The Court below allowed the claim.

On appeal by the defendant,

Held, confirming the decree, that in order to make out that the Government had become entitled to the haks (Dasname Sanyasi and Gosavi Zundivale) by virtue of an escheat three things must be established, namely, that (1) there was a heritable grant to individuals, (2) that the heirs of those individuals have failed, and (3) that on the happening of these two conditions the haks would escheat to Government.

The burden of establishing a title by escheat lies on those who assert it.

The expressions Dasname Sanyasi and Gosavi Zundivale do not indicate individuals. They indicate a group or community of Sanyasis or Gosavis.

The law of the country recognizes fluctuating communities as legal *persons* capable of owning property, as, for instance, the caste and the village, and the haddars in the present case were communities composed of the religious elements their names indicate.

A corporate body is dissolved by the total loss of all its members, but on such dissolution there is no escheat to the Crown either of its lands or its rent-charges. On the dissolution of the corporation the cause of the grant fails, and the effect of a dissolution on the corporation's rent-charges is that they become extinguished. As in the case of the death of a grantee of an annual payment out of land to last during the term of his life the payment sinks into land on its determination, so where the grantee is a community and the grant is to last during the term of its existence on its dissolution a similar result follows.

Where there has been a well established user extending over a long series of years it is the duty of the Court, if possible, to find a legal origin of the existing facts.

APPEAL against the decision of R. Knight, District Judge of Sátára, in original suit No. 2 of 1898.

Suit to recover a certain sum on account of *Karim* (ancient) haks in an Inám village.

The plaintiffs were the Inámdárs of the village of Mhavshi in the Sátára District, under a sanad dated 1762 A.D. In the village there were certain hakedárs, amongst whom were included Dasname Sanyasi and Gosavi Zundivale. The village accounts showed that Rs. 90-2-0 were debited in the names of the said two hakedárs, but the plaintiffs were in receipt of the said amount ever since their Inám grant. In the year 1898, Government having withheld the payment of the said amount, the plaintiffs brought the present suit, alleging as follows:—The revenues of the village were annually divided between them and Government, and Government wrongfully took Rs. 90-2-0 out of the amount due to the plaintiffs in January and March, 1898. The defendant took the said amount from plaintiffs' share under the Collector's order dated the 14th October, 1897. The plaintiffs appealed against the said order to the Commissioner, Central Division, but without effect. Thus the plaintiffs had made all possible appeals. The reasons assigned by Government for withholding the amount were not proper. Whatever alterations the officers of Government might have made in the village accounts in relation to the items of Dasname Sanyasi and Gosavi Zundivale (under which the amount in question was entered) there was no alteration in the amount which the plaintiffs were entitled to receive. Notice under section 424 of the Civil Procedure Code (Act XIV of 1882) was duly served on the defendant.

1903.

THE
SECRETARY
OF STATE
v.
HABIBRAO
HARI.

1903.

THE
SECRETARY
OF STATE
v.
HATBATHAO
HARI.

The plaintiffs, therefore, prayed that they should be allowed to recover Rs. 90-2-0 from the defendant with interest thereon at 9 per cent. up to date of payment.

The defendant replied that the claim was time-barred, that the amount in suit was not unlawfully deducted from plaintiffs' dues, inasmuch as by the terms of their sanad it lapsed to Government, that the plaintiffs were estopped by section 115 of the Evidence Act (I of 1872) from pleading that the sum in suit was not *Kadim* (ancient) Inám, and that the claim was barred by section 11 of the Revenue Jurisdiction Act (Bom. Act X of 1876).

The sanad in suit is embodied in the High Court's judgment.

The Judge found that the plaintiffs having exhausted all possible appeals under section 204 of the Land Revenue Code (Bom. Act V of 1879) against the order of the Collector the suit was not barred by that Act, that the plaintiffs were not estopped from pleading, that the allowance in suit was not *Kadim* Inám, and that the plaintiffs had acquired prescriptive title to the allowance. The Judge therefore allowed the claim.

The defendant appealed.

V. J. Kirtikar (Government Pleader) for the appellant (defendant):—We contend that plaintiffs have not exhausted all the remedies contemplated by section 11 of the Revenue Jurisdiction Act. Only one appeal was preferred against the Collector's order, namely, an appeal to the Commissioner, Central Division, but section 204 of the Land Revenue Code allows one more appeal, that is, an appeal to Government.

[The Court over-ruled the objection on hearing *R. P. Karandikar* for the respondents, who pointed out that the original order was passed by the Mámlatdár, against that order there was a first appeal to the Collector, who having confirmed the order, there was a second appeal to the Commissioner, Central Division.]

Next we contend that the two haks in dispute are *Kadim* grants, that is, they have been in existence prior to the grant of the Inám to the plaintiffs' ancestors. A reference to the settlement sanad of 1888 will show that the plaintiffs' Inám is exclusive of those haks, which are included in the item of Rs. 213-10. There is no evidence to show that they were subsequently created by the Inámdár plaintiffs, but on the contrary they seem to

1903.

THE
SECRETARY
OF STATE
v.
HAIBATRAO
HABLI.

admit that the haks are *Kadim* because they say that they never made any payment on account of those haks. We contend that under the terms of the sanad we became entitled to those haks as soon as the individuals representing the haks disappeared. We further contend that each of the two sects, though composed of several individuals, should be considered to be one legal *persona*.

R. P. Karandikar for respondents 1—4, 6—8 and 10—13 (plaintiffs):—We rely upon our long practice and recognition of title by the Inám Commission in 1859-61: *Vasudev Pandit v. The Collector of Puna*.⁽¹⁾ The claim of Government, if it was ever in existence at all, long ceased to exist and is barred by limitation. A solitary entry in the village accounts of payment to hakedárs in the year 1818 was explained away by us in the statements made in the old revenue inquiries.

Dasname Sanyasis and Gosavis Zundivale are not particular individuals but sects (Steele on Hindu Law and Customs, Edition of 1868, p. 435 *et seq.*).

Government claim by escheat, but they have neither proved escheat nor that it occurred within the statutory period.

It is admitted by Government that we have not made any payment to the Sanyasis or to the Gosavis since 1818. There is nothing to show that the payment was made in 1818 as of right. Our user and enjoyment have, therefore, ripened into ownership supposing we had none before. But we claim the money as our own, inasmuch as neither the Sanyasi nor Gosavi item has been proved to be *Kadim*, that is, existing before the grant to the plaintiffs' ancestors in 1762 A.D. The older account of 1759 A.D. mentions no such items.

The grant of the fresh sanad in 1888 does not alter the situation because we had enjoyed the money for more than sixty years after the solitary entry in 1818. A much shorter period would have been sufficient as Sátára District was brought under regulation only by Act III of 1863. The acceptance of the British sanad in 1888 by some of the plaintiffs only does not bind all the plaintiffs, nor do any incorrect figures in the sanad operate as estoppel having regard to the circumstance that long

(1) (1873) 10 Bom. H. C. R. 471.

1903.

THE
SECRETARY
OF STATE
v.
HAIBATRAO
HARI.

before the fresh sanad was granted the true facts with respect to the allowance in suit had been brought to the notice of Government. The sanad creates no right in favour of Government, nor does it revive any such right if it ever existed. The sanad cannot be considered to be a new agreement between the parties, there being no consideration for it.

S. R. Bakhle for heirs of respondent 5 and for respondent 9 :—
We have held adversely to the intended donees. Government have not proved escheat.

V. J. Kirtikar (Government Pleader) was heard in reply.

JENKINS, C. J.—The plaintiffs are the Inámdárs of the village of Mhavshi in the Wái Taluka of the Sátára District, and on the strength of the title this implies they seek in this suit to recover a sum of Rs. 90-2-0 which they allege was due to them but was wrongly taken by the defendant.

The plaintiffs' title as Inámdárs dates back to 1762, for in that year an Inámpatra was passed to the plaintiffs' predecessor in the following terms :—

"To Rajashri Narsingrao Janardhan surnamed Wagh, of the Bharadwaj Gotra, Ashwalayana Sutra, Astrologer and Kulkarni of Mauze Morve, pargane Sirval.

"Compliments of servant Madhavrao Ballal Pradhan. The Inampatra given in writing in the Soor year Sallas, Shitain, Maya and Alaf, Shake 1684, in the cyclical year called Chitrabhanu, is as follows :—You, having come to the camp in Kasla Poona, represented to the Huzur that you were a family-man, that you should be maintained, that therefore the liege lord may be graciously pleased to settle and grant a village as a fresh Inam and that letters may be executed in your favour as authorities for enjoyment. Thereupon, considering that you rendered service to the liege lord for a long time and that you are a family-man and that it is necessary to provide for your maintenance and out of kindness towards you, the village of Mhavshi, in Taraf Nirthadi, Prant Poona including the dutarfa that is the Swarajya and the Moglai (shares of the revenue) together with the Sardeshmukhi and all cesses and taxes and with all the present and future cesses exclusive of Hakdars and Inamdars and together with water, trees, grass, wood, stones, mines and buried treasure, etc., is settled and granted as fresh Inám. Therefore you are to get the village aforesaid transferred to you; and you, your sons, grandsons, and descendants from generation to generation are to enjoy the Inám and live in peace. Be this known. The 26th Moon of Safar. This mandate is final."

1903.

THE
SECRETARY
OF STATE
v.
HAIBATRAO
HARI.

"It is hereby declared, that the said village shall be continued for ever by the British Government, under section IV and section XVI, clause B, of Act II of 1863 of the Bombay Legislative Council, as the private property of the persons who shall, from time to time, be its lawful holders, on the following conditions :—

"*Firstly*.—That the said holders shall continue faithful subjects of the British Government, and shall pay to the same a fixed annual sum of Rs. 31-9-0 as Nazarana, in addition to any Jooree or other tax heretofore payable.

"*Secondly*.—That the said holders shall have no present or future claim to any alienations, whether land or cash, more ancient than the grant of the village, all which shall be permitted to be enjoyed under such orders as the British Government may from time to time issue, till such time as they may finally escheat to the British Government.

"*Thirdly*.—That if in any case the existing assessment of occupied lands has been guaranteed by the Revenue Survey, such guarantee shall be respected in its integrity until the expiration of the period of the guarantee, after which the holders of the village shall be at liberty to revise the assessment, all lawful rights and privileges of minor Inámdárs, cultivators, sub-tenants, or others being maintained.

"In consideration of the fulfilment of which conditions the said village of Mhavshi shall be continued for ever, without increase of Land-tax or Nazarana over the said fixed amount, and without objection or question on the part of Government as to the rights of any lawful holders thereof, whether such rights shall have accrued by inheritance, adoption, assignment, or otherwise."

The sum of Rs. 213-10-0 mentioned in the column of cash deductions includes two items, one a hak in favour of Dasname Sanyasi, the other a hak in favour of Gosavi Zundivale, and it is in connection with these two haks that the plaintiffs' claim is made.

Stated shortly the rival contentions are these: the plaintiffs maintain that they are entitled to receive the amount of these two haks, that it always has been received by them, and that since 1818 they have not paid the hakedárs indicated and so have gained a prescriptive title to the haks.

The Secretary of State in Council on the other hand alleges that the haks are *kadim*, and have escheated to the Government.

We think the evidence establishes that the haks are *kadim*; they certainly are ancient, and according to the sanad of 1888 they are more ancient than the grant of the village, for admittedly they are included in the Rs. 213-10. It is urged that this sanad is of no value as it was not signed by all the Inámdárs;

but, though it may not have been signed by all, it was accepted by all as the basis of the settlement arrived at. We do not think this conclusion is shaken by the account of 1759, for in the first place it is three years earlier than the original sanad, and in the next place it is not clear that we have in it a complete statement of all the haks then existing.

We will therefore deal with the case on the footing of the haks being *kadim*, and consider what under the circumstances are the legal consequences of the non-payment of these haks to the proper hakedars since 1818.

First then, has the defendant made out that the Government has become entitled to the haks by virtue of an escheat? For this at least three things must be established: (1) that there was a heritable grant to individuals, (2) that the heirs of those individuals have failed, and (3) that on the happening of these two conditions the haks would escheat to Government.

Now it is clear that the burden of establishing a title by escheat lies on those who assert it, so that we must be satisfied that the burden has been discharged: *Gridhari Lall Roy v. The Bengal Government*.⁽¹⁾ The evidence (in our opinion) falls short of establishing the first of these conditions, for it is not shown that the grant was to individuals; no one is able to say that the expressions Dasname Sanyasi and Gosavi Zundivale indicate individuals, and there is very good reason to believe that they do not.

In Steele on Hindu Law and Custom there is an appendix which deals with the custom of Gosavis, and it is there said that "all questions relating to the internal administration and discipline of the order are decided by an assembly called the *Dusname* which should consist of the disciples of the ten founders from whom they take their names." It appears to us therefore that the grant was to an assembly or community of Sanyasis. In the same way Gosavi Zundivale does not point to any particular individuals as such, but to a group or community of Gosavis.

There can be no doubt that the law of the country recognized fluctuating communities as legal *personæ* capable of owning

1903.

THE
SECRETARY
OF STATE
v.
HAIBATRAO
HARI.

(1) (1863) 12 Moo. I. A. 448 at p. 454.

1903.

THE
SECRETARY
OF STATE
v.
HAIBATRAO
HARI.

property, as, for instance, the caste, and the village, and in our opinion the hakdárs here were communities composed of the religious elements their names indicate.

What then is the reasonable inference to draw from the fact that no payment has been made to either of these bodies since 1818 and that no trace can now be found of them?

It is a sound principle that, where there has been a well established user extending over a long series of years, it is the duty of the Court, if possible, to find a legal origin of the existing facts; and in accordance with this principle it has been laid down in *Sumbhoolall Girdhurlall v. The Collector of Surat*,⁽¹⁾ where a question arose as to the title to *Tora Garas*, that "long enjoyment is itself a title as well in favour of the recipient of an annual payment out of land as of the possession of land itself."

The receipt therefore by the plaintiffs and their predecessors since 1818 of the annual payment clearly affords the basis of a title founded on long possession. The Government would account for the non-payment to the hakdárs by the failure of their heirs, but if (as we have held) the hakdárs were communities, that is obviously an incorrect description of the position. Accepting, however, the facts this description implies, the position would be that the hakdárs have determined by the loss of the constituent members, and, as a result, the haks have become extinguished. This view of the facts would furnish a complete explanation of all that has occurred and would be in harmony with the principle that long possession is a title, for as the haks were presumably payable out of the land, when they ceased, the profits representing them would go to the owner of the land; and this is in accordance with the actual enjoyment.

The statement that the haks have become extinguished demands a word of explanation.

According to the law of England a corporate body is dissolved by the total loss of all its members, but on such dissolution there is no escheat to the Crown either of its lands or its rent-charges. And the reason is that on the dissolution of the corporation the cause of the grant fails. The effect of a dissolution on the corporation's rent-charges is that they become

(1) (1859) 8 Moo. I. A. 1 at p. 40.

extinguished: Viner's Abridgment, Rent, B. b, plac. 2. It is no doubt true that so far as the English law of escheat is founded on the principles of feudal law it furnishes no conclusive clue to the operation of the law of escheat in India (*Ranee Sonet Kowar v. Mirza Himmet Bahadoor*⁽¹⁾), but this rule as to the property of dissolved corporations appears to us to be founded on a broader basis than that furnished by the technicalities of the feudal law, and to furnish a useful guide in the circumstances of the present case.

The applicability of this doctrine becomes the more apparent if we consider the result that follows on the death of one who is the grantee of an annual payment out of land to last during the term of his life; clearly it sinks into the land on its determination. So if the grantee is a community, and the grant is to last during the term of its existence, on its dissolution a similar result follows.

But the case cannot be disposed of without considering the effect of the sanad granted under the Summary Settlement, wherein these haks are included among the deductions to be made in respect of cash allowances.

By the second condition of the sanad it is provided that the holder shall have no claim to any alienations whether land or cash more ancient than the grant of the village, all which shall be permitted to be enjoyed under such orders as the British Government may from time to time issue till such time as they may finally escheat to the British Government, but in our opinion this makes no difference in the result; for if the hak had prior to the Summary Settlement become extinguished, as on the facts, we think, should be held, then this sanad could not operate to revive the hak; for, apart from all other reasons, the hakdars whose continuance was a necessary condition of the haks were no longer in existence.

The objection that the suit is barred by the Revenue Jurisdiction Act has been overruled by the District Judge, but for the Government it is argued that he has misapprehended the requirements of the law. The governing section is the 11th of that Act which provides that "No Civil Court shall entertain

1903.

THE
SECRETARY
OF STATE
&
HABIBRAO
HARI

(1) (1876) 3 I. A. 92.

1903.

THE
SECRETARY
OF STATE
v.
HAIKATRAO
HABLI.

any suit against Government on account of any act or omission of any Revenue officer unless the plaintiff first proves that, previously to bringing his suit, he has presented all such appeals allowed by the law for the time being in force, as within the period of limitation allowed for bringing such suit, it was possible to present." By section 204 of the Land Revenue Code it is provided "An appeal shall lie to the Governor in Council from any decision or order passed by a Commissioner or by a Survey Commissioner, except in the case of any decision or order passed by such officer on appeal from a decision or order itself recorded on appeal by any officer subordinate to him."

There has been no appeal to the Governor in Council here, but there has been to the Commissioner, so we have to see whether the Commissioner's order was on appeal from an order itself recorded on appeal.

It seems that there have been successive orders in this matter by the Mámlatdár, the Collector, and the Commissioner.

The Commissioner's order was undoubtedly on appeal from one of the Collector, but the difficulty has been to determine whether the Collector's order was on appeal from the Mámlatdár. Unfortunately the record is meagre on this point, but under the circumstances the safer inference would appear to be that the Collector's order was passed on appeal, and in this view of the case the plea must be overruled.

For these reasons we affirm the decree of the District Judge with costs.

Decree confirmed.

- APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Aston.

DHANJIBHAI GIRDHARBHAI (ORIGINAL PLAINTIFF), APPLICANT v.
MATHURBHAI GHELABHAI (ORIGINAL DEFENDANT 4), OPPONENT.*

1903.

December 15.

Civil Procedure Code (Act XIV of 1882), sections 520, 521 and 526—Arbitration—Award—Allegations against the award—Refusal to file the award—Objections must be proved to the satisfaction of the Court.

It is not sufficient merely to allege a cause or ground against the filing of an award such as is indicated in sections 520 and 521 of the Civil Procedure Code (Act XIV of 1882), but the cause or the ground must also be proved to the satisfaction of the Court :

Dandekar v. Dandekars (1) followed; *Venkatesh Khando v. Chanap-garda* (2) and *Tejpur v. Mahomed Jamal* (3) distinguished.

APPLICATION under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of Lallubhai P. Parekh, First Class Subordinate Judge of Surat.

Suit to obtain a decree in terms of an award.

The plaintiff sued to have the award made by the arbitrators appointed by parties without the intervention of the Court filed and to obtain a decree thereon alleging that there were disputes between the parties regarding houses, lands, etc.; that with a view to have them settled they appointed certain arbitrators on the 13th July, 1899; that the arbitrators gave their award the next day, and that the plaintiffs were entitled to have the award filed and to obtain a decree in its terms.

Defendants 1, 2, 3 and 5 were absent.

Defendant 4 contended *inter alia* that the plaintiff's application did not satisfy the requirements of the Civil Procedure Code; that the award was indefinite and incomplete; that it was incapable of execution; that it was made without hearing him and without taking his evidence; that two of the arbitrators did not act honestly, and that the award was illegal and could not be filed under section 525 of the Civil Procedure Code.

* Application No. 252 of 1902 under the extraordinary jurisdiction.

(1) (1882) 3 Bom. 663.

(2) (1892) 17 Bom. 674.

(3) (1896) 20 Bom. 596.

1933.

DHANJIBHAI
GIRDHARBHAI
v.
MATHURBHAI
GIRDLABHAI.

The Subordinate Judge raised the following issues:—

1. Is the award sought to be converted into a decree legal and valid under the Civil Procedure Code?
2. Is the award indefinite and imperfect and thus incapable of enforcement?
3. Does the defendant 4 show any corrupt motive or spite on the part of the arbitrators?
4. Was defendant 4's submission obtained conditionally and is the award void for non-fulfilment of the condition?
5. Can the plaintiff's prayer be granted?

The Subordinate Judge found on issue No. 5 in the negative and dismissed the suit without recording findings on the other issues for the following reasons:—

The award, Exhibit 24, sought to be filed appears to be indefinite. * * *

The award nowhere says that the parties were heard by the arbitrators before it was made.

Plaintiff Dhanji says (*vide* Exhibit 20) that he had no dispute regarding the lands disposed of by Narotam by his will and yet the arbitrators appear to have awarded part of the lands to the plaintiff.

Arbitrator Raising says (*vide* Exhibit 21) that no evidence was taken by him and the other arbitrators before making the award. It appears that none of the parties except the plaintiff and defendant Jhaver were called and heard by the arbitrators (*vide* Exhibit 21). They did not even care to inquire where the other parties were. Arbitrator Kashinath (Exhibit 22) says that Dhanji, plaintiff, was first called and then Jhaver was called and heard each in the absence of the other, and that no evidence regarding the adoption was taken by them.

Hearing one of the parties in the absence of the other is a breach of duty on the part of the arbitrators. It therefore entitles defendant No. 4 to have the award set aside: I. L. R. 18 Bom. 299.

The objections raised by the defendant regarding the *factum* and validity of the award are not merely frivolous or colourable. I have, therefore, no jurisdiction to deal with them. I therefore refrain from deciding the first four issues of this case (*vide* I. L. R. 20 Bom. 596). I must, therefore, refer the parties to a regular suit.

In I. L. R. 17 Bom. 674 it was held that where the objections taken by the defendant are not obviously unfounded the award cannot be filed.

The plaintiff applied under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) urging that the Court erred in not exercising the jurisdiction vested in it by law; that it did not properly understand the scope of the inquiry provided for by sections 525 and 526 of the Civil

1903.

DHANJIBHAI
GIRDHARBHAI
v.
MATHUREBHAI
GHELABHAI.

Procedure Code ; that the *factum* of the reference to arbitration being admitted the Court was wrong in withholding the exercise of its jurisdiction ; that the mere circumstance that the objections raised by the defendant were not on the face of them frivolous and colourable did not deprive the Court of its jurisdiction unless they were proved to be substantial and proper ; that the view taken by the Court was erroneous and it was wrong in not recording its findings on the first four issues, and that it erred in referring the parties to a regular suit instead of filing the award. A *rule nisi* having been issued calling on the defendants to show cause why the order of the Subordinate Judge should not be set aside :

Markand N. Mehia appeared for the applicant (plaintiff) in support of the rule :--We applied for the filing of the award under section 526 of the Civil Procedure Code, but the Judge refused to do so on the ground that, as the defendant raised several objections against the *factum* and the validity of the award, he had no jurisdiction to entertain and dispose of the application on the merits. The Judge relied on the decisions in *Venkatesh Khando v. Uhanappavda* ⁽¹⁾, *Tejpur v. Mahomed Jamal* ⁽²⁾, and without giving any finding on the first four issues, referred the parties to a civil suit. Section 521 of the Civil Procedure Code lays down three requisites against filing an award, and if those three requisites are absent, the Court cannot refuse jurisdiction. In the present case the *factum* of arbitration is not disputed, so the cases referred to by the judge do not apply. We rely on *Amrit Ram v. Dasrat Ram* ⁽³⁾ ; *Mahomed Wahiduddin v. Hakiman* ⁽⁴⁾ ; *Surjan Rao v. Bhikari Rao* ⁽⁵⁾ ; *G. S. Jones v. H. Ledgard*. ⁽⁶⁾ The view taken by the Judge is erroneous. He should have entertained our application and gone into the merits. The objections urged against the filing of the award are such as are contemplated by sections 520 and 521 of the Civil Procedure Code and they have not at all been proved. The Judge should have taken evidence and recorded findings on the other issues.

(1) (1892) 17 Bom. 674.

(2) (1896) 20 Bom. 596.

(3) (1894) 17 All. 21.

(4) (1898) 25 Cal. 757.

(5) (1893) 21 Cal. 213.

(6) (1886) 8 All. 340.

1903.

DHANJIBHAI
GIRDHARBHAI
v.
MATHURBHAI
GHELABHAI.

Krishnalal M. Jhaveri appeared for the opponent (defendant 4) to show cause :—We have shown all the grounds mentioned in sections 520 and 521 of the Civil Procedure Code. The Judge has, as a matter of fact, found on all the issues, though he has not recorded distinct findings on them and it was not necessary for him to do so. A mere allegation that such grounds as are mentioned in sections 520 and 521 exist is quite sufficient to preclude the Court from making an inquiry : *Venkatesh Khando v. Chanappavda*.⁽¹⁾ But in the present case there is something more than mere allegations. The arbitrators and parties were examined. We disputed the *factum* and the validity of the award, therefore the Judge was right in referring the parties to a Civil Suit : *Tejpur v. Mahomed Jamal* ⁽²⁾ ; *Dandekar v. Dandekars* ⁽³⁾.

Mehta in reply.

JENKINS, C. J.—The present application arises out of a refusal by the First Class Subordinate Judge of Surat to file an award under section 526 of the Civil Procedure Code. It is conceded that there was a submission and an award, and that the applicant was interested in the award ; but the Subordinate Judge declined to file the award because he conceived himself to be bound by the decisions in *Venkatesh Khando v. Chanappavda*⁽¹⁾ and *Tejpur v. Mahomed Jamal*,⁽²⁾ for he took the results of those decisions to be that, if to an application for the filing of an award any substantial grounds of objection are brought in, then the Court has no jurisdiction to entertain and dispose of the application on its merits.

There is an impression that the view of the Bombay High Court is diametrically opposed to that of the other Courts, but we think that this exaggerates the difference that really exists.

The objections against the filing of an award may fall under two heads : those indicated in sections 520 and 521 of the Code of Civil Procedure and those which do not fall within the descriptions of those sections.

⁽¹⁾ (1892) 17 Bom. 674.

⁽²⁾ (1896) 20 Bom. 596.

⁽³⁾ (1882) 6 Bom. 663.

Section 526 provides that if no ground such as is mentioned or referred to in section 520 or 521 be shown against the award, the Court shall order it to be filed and such award shall then take effect as an award made under the provisions of this chapter; and it has been decided in *Dandekar v. Dandekars*⁽¹⁾ that under the corresponding sections of Act X of 1877, it did not suffice merely to *allege* a cause or ground against the award such as is indicated in the sections 520 and 521 of the present Code, but that the cause or the ground must also be proved to the satisfaction of the Court.

The cases cited in support of the view that the mere allegation of a cause or ground suspends the power of the Court to act under section 525 are *Samal Nathu v. Jaishankar Dalsukram*⁽²⁾; *Hirjibhai v. Jamsetji*⁽³⁾; *Venkatesh Khando v. Chanappavda*⁽⁴⁾, and *Tejpur v. Mahomed Jamal*⁽⁵⁾; but Sir Charles Sargent in *Venkatesh Khando v. Chanappavda*⁽⁴⁾ and Sir Charles Farran in *Tejpur v. Mahomed Jamal*⁽⁵⁾ are careful to point out that the case of *Dandekar v. Dandekars*⁽¹⁾ is in no way touched by their decisions, and the result of these cases appears to us to be that the Bombay High Court is in accord with the others, where the cause alleged is one under section 520 or 521, and that it differs from them only in declining to hold that objections other than those can be made the subject of investigation and determination in a proceeding under chapter 37 of the Code of Civil Procedure.

In this case we have nothing to do with the latter class of objections, because it is clear that the objections urged against the filing of the award fall under sections 520 and 521 of the Civil Procedure Code. We therefore think that the learned Judge was in error and failed to exercise the jurisdiction which was vested in him when he declined to investigate and determine the merits of the grounds urged against the filing of the award. We accordingly make the rule absolute, set aside the order of the Subordinate Judge, and remand the case to the Lower Court for a decision on the merits.

Costs of this rule will be costs in the application.

Rule made absolute.

(1) (1882) 6 Bom. 663.

(2) (1884) 9 Bom. 254.

(3) (1890) P. J. p. 250.

(4) (1892) 17 Bom. 674.

(5) (1896) 20 Bom. 596.

1903.

DHANJIBHAI
GIRDHABBHAI
v.
MATHURBHAI
CHELABHAI.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

1904. THE MUNICIPAL OFFICER, ADEN (ORIGINAL DEFENDANT), APPLICANT,
January, 20. v. ABDUL KARIM FATEH MAHOMED (ORIGINAL PLAINTIFF), OPPO-
NENT.*

Letters Patent, clauses 13, 40—Privy Council—Leave to appeal—Interlocutory orders—Jurisdiction, question of.

The High Court in the exercise of its extraordinary Original Civil Jurisdiction removed to itself for trial a suit instituted in the Court of the Resident at Aden. On an application having been made for leave to appeal to the Privy Council—

Held, that the certificate prayed for should be given, for (1) even if the order to be appealed from was interlocutory, the High Court had discretion to grant the certificate under clause 40 of the Amended Letters Patent; (2) that the value of the subject-matter was Rs. 10,000; and (3) the question raised was one of jurisdiction.

APPLICATION by the Municipal officer at Aden for leave to appeal to the Privy Council.

On the 5th March, 1903, the opponent applied to the High Court on the Appellate Side for a transfer of the suit filed by him against the Municipal officer at Aden in the Court of the Resident at Aden to the High Court of Bombay for trial and determination.

The High Court (Candy, Officiating C.J., and Chandavarkar, J.) on the 7th July, 1903, ordered the transfer of the case to itself.

The applicant applied for leave to appeal to the Privy Council: the prayer was expressed as follows:—

* Your petitioner therefore prays that your Lordships will be pleased—

(a) to grant him permission under clause 40 of the said Letters Patent to appeal against the said order to His Majesty in Council and to grant him in such form as to your Lordships may seem meet a certificate that the case is a fit one for such appeal; and

(b) to admit his petition and to transmit to His Majesty in Council under the seal of this Honourable Court a correct copy of the record so far as is material to the questions in dispute herein.

The grounds upon which the application was made were that (1) the Court of the Resident at Aden was not subject to the superintendence of the High Court of Bombay; (2) that the High Court had no power to transfer the suit for trial to itself as a Court of extraordinary original jurisdiction under the provisions of clause 13 of the Amended Letters Patent; (3) that the said clause could not be applied in the case of a suit instituted in a Court not subject to the appellate jurisdiction of the High Court; and (4) that under the provisions of Act II of 1864 the Court of the Resident at Aden is not subject to the appellate jurisdiction of the High Court.

Scott (Advocate General), with the Government Solicitor, for the applicant.

Setalvad, with *Edgelow*, *Gulabchand* and *Wadia*, for the opponent.

CHANDAVARKAR, J.:—We think we must grant the certificate applied for. It is true that the application for the transfer of this case was made and heard on the Appellate Side of this Court, where appeals from the mofussil Courts are dealt with; but clearly it was an application under our extraordinary jurisdiction, which could be entertained by this Court and heard only under section 13 of the Charter Act: and according to section 40 of that Act, even assuming that the order is interlocutory, we have discretion to grant the certificate.

The value of the property is not quite clear from the records of the case, but as is pointed out to us by the learned Advocate General, the plaintiff claims rent at Rs. 50 a month, or Rs. 600 a year, and that would come to over Rs. 10,000 at 18 years' purchase. Even assuming that the value is less than Rs. 10,000, we think this is a fit case for the grant of the certificate applied for. This Court has held that it has jurisdiction to transfer this case from the Aden Court to this Court. That really means that the plaintiff can sue in this Court, and not at Aden. The question raised is one of jurisdiction which goes to the root of the case: see *Hadjee Ismail v. Hadjee Mahomed—Rohima Bye v. Hadjee Mahomed* ⁽¹⁾.

(1) (1874) 13 Beng. L. R. 91 at p. 101.

1904.

MUNICIPAL
OFFICER,
ADEN,
v.
ABDUL
KARIM.

We therefore declare that the case is a fit one for appeal to the Privy Council and direct that the certificate applied for be granted.

Costs of this application to be costs in appeal.

Certificate granted.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

1904.
January 13.

RAMPYARABAI, WIDOW OF GANESHRAM (ORIGINAL PLAINTIFF), APPELLANT, v. BALAJI SHRIDHAR (ORIGINAL DEFENDANT), RESPONDENT.*

Indian Evidence Act (I of 1872), sections 32 (2), 34—Accounts—Corroboration.

The plaintiff relied on entries in the handwriting of her deceased husband kept in the ordinary course of his business.

Held, that entries in accounts relevant only under section 34 of the Indian Evidence Act (I of 1872) are not alone sufficient to charge any person with liability; corroboration is required; but where accounts are relevant also under section 32 (2), they are in law sufficient evidence in themselves, and the law does not, as in the case of accounts admissible only under section 34, require corroboration. Entries in accounts may in the same suit be relevant under both sections, and where that is so, it is clear that inasmuch as they are relevant under section 32 (2), the necessity of corroboration prescribed by section 34 does not arise.

Though accounts which are relevant under section 32 (2) do not as a matter of law require corroboration, the Judge is not bound to believe them without corroboration; that is a matter on which he must exercise his own judicial discretion as a Judge of fact.

SECOND appeal from the decision of L. Crump, District Judge of Sátára, confirming the decree passed by V. V. Paranjpe, First Class Subordinate Judge of Sátára.

The plaintiff, who was the widow of one Ganeshram, sued in the year 1897 to recover from the defendant Rs. 1,423, including interest, as the balance due to her deceased husband on a current account. The plaint alleged that the sum claimed was due in respect of fifteen debit items amounting to Rs. 1,644 of various

* Second Appeal No. 266 of 1903.

dates from the 9th November, 1891, to the 5th March, 1896, and that Rs. 551-9-0 paid by the defendant in two items, *viz.*, Rs. 401-9-0 and Rs. 150, had been credited in his favour.

The defendant admitted having received only four items in the account amounting to Rs. 139-2-0, but he contended that he received those items in satisfaction of the debt due to him by the plaintiff's deceased husband. He denied having received the rest of the debit items in plaintiff's account or having paid the two credit items specified in the plaint. He further contended that the khata sued on was fictitious and that the claim was time-barred.

The Subordinate Judge found that the dealings shown in the khata in suit were not proved to have taken place between the parties. He, therefore, dismissed the suit.

On appeal by the plaintiff, the Judge confirmed the decree, though he held that the item of Rs. 175 specified in the plaint was proved. The Judge made the following observations:—

The items are set out in detail in the plaint. There were admittedly dealings between the parties, and the first question is how is the claim arrived at and what is the exact nature of the dispute? According to plaintiff there were two accounts kept, one styled the khasgat (or private) account and the other the chalu (or current) account; the first seven items specified in the plaint (excluding those of interest) are taken from the khasgat khata.

* * * * *

Ganeshram, the deceased husband of plaintiff, died in 1896, and it is admitted that the khasgat khata is an account regularly kept in the ordinary course of business and it is in the handwriting of the deceased. It is admissible in evidence under sections 32 and 34 of the Indian Evidence Act. It is urged by defendant that his accounts are also in part written by a deceased person, but this circumstance is of little value. The mere omission to record a certain transaction is obviously of less importance than an assertion of it. If plaintiff's case is true, then there is nothing unnatural in defendant's accounts not showing these items. It appears to me that an account such as this is "*a priori* entitled to a higher degree of credit than a similar account produced by a living person." It cannot possibly be a recent fabrication. At the same time corroboration is required. It is true that there is no very adequate explanation as to why defendant wished to open two accounts. One witness (Exhibit 60) says that in his experience two accounts are sometimes opened by the same man and it is possible to suggest several motives. I do not think the circumstance seriously detracts from the value of the khata.

1904.

RAMPYARA-
BAI
v.
BALAJI
SHRIDHAR.

1904.

RAMPYARA-

DAI

v.

BALAJI
SHRIDHAR.

The only question is, whether there is sufficient corroboration as to the several items.

* * * * *

It appears to me therefore that of the items in the khasgat khata one only, viz., No. 3, Rs. 175, can be held proved. It is argued that as the account is strongly corroborated in this one instance, the other items should require a less stringent proof. Admitting that this is so, I am of opinion that the proof is in no instance sufficient. I do not think it necessary to consider the credit items in detail. Even if satisfactorily proved, it is clear it would be impossible to hold the remaining debit items proved. It may be—it is indeed by no means improbable—that this account represents genuine transactions, but if persons will advance money without reasonably securing themselves against repudiation they alone are to be blamed for any loss which may be caused to them.

Plaintiff preferred a second appeal.

R. P. Karandikar (with *S. R. Bakhle*), for the appellant (plaintiff) :—The Judge noticed only seven items out of the fifteen items specified in the plaint, and out of the seven items he held only one, viz., that of Rs. 175, proved. Both the parties had produced their accounts. The plaintiff is a widow. She cannot appear in public and she was examined on commission. In her deposition she distinctly says that the items in suit were advanced by her deceased husband to the defendant, who was on friendly terms with her husband. If corroboration is necessary, we submit that there is sufficient evidence of corroboration. The Judge has omitted to consider material evidence which was in no way assailed. Though the Judge was of opinion that our claim may be just, he has not applied his mind to the sufficiency or otherwise of the evidence given by the plaintiff. With respect to corroboration the Judge has referred only to section 34 of the Evidence Act. This is an erroneous view. The corroboration as it is in this case is, we submit, sufficient to support the plaintiff's case : *Baburav v. Lala*.⁽¹⁾ The evidence of the plaintiff, who says that the advances were made by her deceased husband in her presence, would make the accounts relevant under section 32 of the Evidence Act and the question of corroboration cannot arise : *Musummat Rajeswari Kuar v. Rai Bal Krishan*.⁽²⁾

(1) (1889) P. J. p. 331.

(2) (1887) 14 I. A. 142.

1904.

RAMPYARA-
BAI
v.
BALAJI
SHRIDHAR.

M. B. Chaudal, for the respondent (defendant):—We had produced our accounts in Court. They were also written by a person who is dead. The items which we denied are not written in our accounts; section 32 alone of the Evidence Act would not be sufficient to create liability. Sections 32 and 34 must be read together. Both the Lower Courts have agreed in holding that the entries by themselves would not be sufficient evidence of the liability. Section 32 was not relied on in the Lower Courts. A new case is sought to be made out in second appeal.

[JENKINS, C. J.:—The Judge has not taken a correct view of the law on the point of corroboration. The case will have to go back.]

Then we submit that the whole case should be re-opened. The finding of the Judge that the item of Rs. 175 is proved is such as cannot be accepted. What the Judge says with respect to it is that there is stronger evidence in support of this item than in support of any other in the claim. This circumstance in itself would not be sufficient to warrant a conclusion that the item is proved. The very fact that the Judge did not pass a decree for Rs. 175 supports our contention.

Karandikar, in reply:—The Judge has found that out of the several items in the plaint the one for Rs. 175 is proved. This is a finding of fact which cannot now be upset.

JENKINS, C. J.—The plaintiff sues to recover a sum of money and in support of her claim she produces certain accounts and also calls oral evidence.

The accounts are relevant both under section 34 and under section 32 (2) of the Indian Evidence Act, 1872.

The learned Judge has considered that corroboration of these accounts was required, and by that we understand that he considered corroboration was necessary as a matter of law. Entries in accounts relevant only under section 34 are not alone sufficient to charge any person with liability: corroboration is required; but where accounts are, as here, relevant also under section 32 (2) they are in law sufficient evidence in themselves, and the law does not as in the case of accounts admissible only

1904.

RAMPYARA-
BAI
v.
BALAJI
SHRIDHAR.

under section 34 require more. Entries in accounts may in the same suit be relevant under both sections as here, and where that is so, it is clear that, inasmuch as they are relevant under section 32 (2), corroboration is not required by the Act. The learned Judge was in error in supposing that the requirements of section 34 applied to the accounts, though they were relevant under section 32 (2).

An error in law therefore has been committed and we cannot allow the decree to stand.

At the same time we wish it to be distinctly understood that though the accounts, which are relevant under section 32 (2), do not as a matter of law require corroboration, the Judge is not bound to act on them without corroboration; that is a matter on which he must exercise his own judicial discretion as a Judge of fact. In what I have said I have in no way limited the discretion of the Judge as a Judge of fact in determining whether or not he will act on the accounts without corroboration, the only point being that the law does not require corroboration.

Therefore the decree must be reversed and the case be remanded for determination on the merits.

Decree reversed. Case remanded.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Batty.

1904.

January, 25.

JETHALAL HIRACHAND VAKIL (ORIGINAL PLAINTIFF), APPELLANT, v.
LALBHAI DALPATBHAI SETH (ORIGINAL DEFENDANT), RESPONDENT.*

Injunction—Encroachment on land—Building over a dhora—Compensation not proper remedy.

The defendant encroached on an abutment (*dhora*) of the wall of the plaintiff, which stood on a piece of ground belonging to the plaintiff. The wall divided the properties belonging to the parties. The abutment was on the defendant's side of the wall. The Lower Appellate Court awarded compensation for this encroachment, on the ground that there was a merely technical encroachment on the part of the defendant because only a foot or so of the plaintiff's ground was covered thereby.

* Second Appeal No. 566 of 1902.

Held, that relief by way of injunction was the proper remedy in such a case, for to allow compensation would be to let a trespasser put a value or money's worth on another man's property and deprive him of it against his will.

Goodson v. Richardson⁽¹⁾ followed.

1904.

JETHALAL
HIRACHAND

v.

LALCHAI
DALPATBHAI.

SECOND appeal from the decision of S. L. Batchelor, District Judge of Ahmedabad, reversing the decree passed by Vadilal T. Parekh, Subordinate Judge of Ahmedabad.

Suit for injunction.

The plaintiff brought a suit against the defendant wherein he prayed that the defendant be restrained from interfering with his right to light and air, and that he (defendant) should be compelled to remove the superstructure that covered his *dhora* (abutment) which was attached to his house (prayer 3).

The contentions put forward by the defendant were that the plaintiff had not acquired a prescriptive right to an easement of light and air, that the *dhora* (abutment) was made recently on the plaintiff's land, and that the construction complained of was not injurious to the *dhora*.

The Subordinate Judge decreed that "the defendant do remove the structure of his rooms that obstruct light and air passing into the plaintiff's house through the four *jalis* (windows) in suit at 45° degree angle." As regards *dhora* his finding was: "It (*dhora*) is old and is still in existence. It is tapering at the top. The *dhora* is kept intact and the defendant had made superstructure. I think no relief can be granted in respect of the *dhora*."

On appeal the District Judge, finding that the plaintiff's claim in respect of light and air was not established, so far dismissed the plaintiff's suit: his opinion about the encroachment on the *dhora* was expressed as follows:—

"The alleged encroachment on the *dhora*, if it exists, is very insignificant, the *dhora* being nothing more than a slight thickening of the base of the plaintiff's wall on the defendant's side. The *dhora* is apparently itself an encroachment and cannot, I think, be allowed to interfere with defendant's right to build on his own land up to the plaintiff's wall."

The plaintiff appealed to the High Court.

(1) (1874) L. R. 9 Ch. 221.

1904.

JETHALAL
HIRACHANDv.
LALBHAI
DALPATRAI.

The High Court (Chandavarkar and Jacob, JJ.) recorded the following interlocutory judgment on the 23rd September, 1903.

CHANDAVARKAR, J.:—The District Judge's decree as to light and air in favour of the plaintiff is objected to before us by the learned Advocate General appearing for the plaintiff on the ground that the District Judge has rejected the evidence of the plaintiff's account books on the erroneous view that they ought to have been produced with the plaint. We do not think that the District Judge's view is exactly that. As we understand his judgment, we take him to mean, not that the account books were inadmissible because they were not filed with the plaint, but that, having regard to the fact that the plaintiff is a pleader and knew the value of the account books, he would have produced them with the plaint, if he had attached to them at the time of its filing the value which he now attaches. Moreover, that is not the only ground on which the District Judge has declined to attach any weight to the account books; he refers to the specific nature of the entries as creating a suspicion. We are, therefore, bound by his finding, which is one of fact, as to the *jalis*. The objection raised by the learned Advocate General to the manner in which the District Judge has disposed of the plaintiff's right to the *dhora* and the alleged encroachment thereon must be allowed. The Subordinate Judge found distinctly that there was no encroachment; the District Judge does not find whether there has been any encroachment but merely says that "the alleged encroachment on the *dhora*, if it exists, is very insignificant." But if the *dhora* belong to the plaintiff and the defendant has encroached on it, however slightly, the plaintiff is either entitled to have the encroachment cleared, or under special circumstances, to damages. It may be that there has been no encroachment in the shape of a building on the *dhora* itself, but if it has been roofed in and that is what we understand to have been the case here, according to the plaintiff's allegation—the plaintiff has a right to complain as the space above the *dhora* would in law belong to the plaintiff and no one without title can trespass thereon. The District Judge says "the *dhora* is apparently an encroachment." If this means that the plaintiff has encroached upon it, no doubt he would have no right to it, but

1904.

JETHALAL
HIRACHAND
v.
LALBHAI
DALPATSHA

it may be that the encroachment has stood for more than twelve years to perfect his title to it and make him its owner when he brought the present suit. The question relating to the *dhora* ought to be gone into more explicitly than the District Judge has done. We, therefore, while overruling the appellant's contention as to the *jalis*, send the case back for fresh findings on the following issues:—

1. Whether the plaintiff, by adverse possession or otherwise, has acquired a title to the ground on which the *dhora* stands?
2. If so, whether he is entitled to have any superstructure of the defendant removed?
3. If not, whether he is entitled to any other relief in respect of the encroachment?

Findings to be returned within one month.

The District Judge found on the issues that the plaintiff had acquired a title to the ground on which the *dhora* stood; that he was not entitled to have any superstructure of defendant removed; and that he was entitled to nominal damages.

The plaintiff filed objections against the findings on issues Nos. 2 and 3.

Branson (with him *L. A. Shah*), for the appellant (plaintiff):—The Lower Appellate Court is wrong in treating the encroachment as technical and trifling. The defendant had no right to build on our land and we are entitled to have our ground cleared of the encroachment unless the defendant can prove acquiescence or standing by on our part, which is neither alleged nor proved. On the contrary the plaintiff is shown to have promptly protested and brought the present action. There are no special circumstances disentitling us to a mandatory injunction and the District Judge has misunderstood the principles of law to be applied in such a case: see *Govind Venkaji v. Sadashiv Bharna Shet* ⁽¹⁾, and *Premji Jivan Bhate v. Haji Cassum Juma Ahmed* ⁽²⁾.

Setalvad (with him *Bhaishankar, Kanga* and *Girdharlal*), for the respondent (defendant):—This Court should not interfere with the discretion of the Lower Appellate Court. The plaintiff

⁽¹⁾ (1892) 17 Bom. 771.

⁽²⁾ (1895) 20 Bom. 298.

1904.

JETHALAL
HIRACHAND
v.
LALBHAI
DALPATBHAI.

did not bring the action until the encroachment was completed, and the relief by way of mandatory injunction is purely discretionary under the provisions of the Specific Relief Act I of 1877. The cases cited by the other side do not apply. The Court ought to be very slow in granting a mandatory injunction.

Branson was heard in reply.

CHANDAVARKAR, J.:—The District Judge has found on the evidence that the ground on which the existing *dhora* or abutment stands belongs to the plaintiff. In his plaint the plaintiff complained that the defendant had built his house so as to overhang a portion of the *dhora* and deprive him (the plaintiff) of his right to light and air; and there was a prayer for the removal of the portion of the defendant's superstructure which covered the *dhora*. The Subordinate Judge in the Court of first instance rejected that prayer on the ground that the defendant's house did not touch the *dhora*. In the findings which he has remitted to this Court on the issues sent down by it the District Judge has now held that the encroachment by the defendant can be adequately relieved by the award of compensation to the plaintiff; and he assesses it at Rs. 10 on the ground that, in his opinion, the plaintiff is entitled only to nominal damages.

It is no doubt the case that one of the issues sent down by this Court for determination was, whether the plaintiff was entitled to any other relief than by way of removal of the defendant's superstructure, in case he should be found not entitled to such removal. That issue did, as the District Judge points out, contemplate as a possibility the award of compensation by way of damages to the plaintiff. But the question is whether the grounds on which the District Judge holds that the plaintiff is not entitled to the removal are sufficient in law.

The decisions of this Court in *Govind Venkaji v. Sadashiv Bharmas Shet* ⁽¹⁾, and *Premji Jivan Bhate v. Haji Cassum Juma Ahmed* ⁽²⁾ are clear authorities to show that "if a stranger builds on the land of another, believing it to be his own, the owner is entitled to

(1) (1892) 17 Bom. 771.

(2) (1895) 20 Bom. 298.

recover the land," and "the party building on the land of another is allowed to remove the building," unless "there are special circumstances amounting to a standing by so as to induce the belief that the owner intended to forego his right or to an acquiescence in his building on the land." No such special circumstances are found by the District Judge to exist in the present case.

But the ground on which the District Judge finds that the plaintiff is entitled to no more than compensation is that there has been on the part of the defendant "a technical encroachment," because "a foot or so of ground has been taken to support the wall which divides the properties" of the parties. But if the foot or so of ground so taken by the defendant belongs to the plaintiff, the act of the defendant is one of continuous trespass on the plaintiff's property and the wrongdoer cannot be heard to say that he has deprived the owner of only a little and that of not much use to the latter. To allow such a defence and on the strength of it to award compensation is to let a trespasser put a value or money's worth on another man's property and deprive him of it against his will. No doubt section 54 of the Specific Relief Act lays down in effect that a perpetual injunction shall not be granted where the Court finds that the invasion by one man of another man's right to property is such that pecuniary compensation can afford adequate relief. But where a man builds on another man's property against the will of the latter or without his consent, the invasion is practically one where pecuniary compensation cannot be regarded as adequate relief. The owner is, in such a case, not only deprived of the property but he is also deprived permanently of such user of it as he is entitled to make. How are the damages to be estimated in such a case and how can it be said that an award of compensation can do justice to the owner who loses the property, and all opportunity besides of using it for purposes which he may consider profitable, or beneficial to himself? The principle upon which such cases are to be decided was enunciated by Lord Selborne, L. C., in *Goodson v. Richardson*,⁽¹⁾ where he

1904.

JETHMAL
HIRACHAND
".
LALBHAI
DALPATBHAI.

(1) (1874) L. R. 9 Ch. 221 at p. 224.

1904.

JETHALAL
HIRACHAND
v.
LALBHAI
DALPATBHAI.

said: "I cannot look upon this case otherwise than as a deliberate and unlawful invasion by one man of another man's land for the purpose of a continuing trespass, which is in law a series of trespasses from time to time to the gain and profit of the trespasser, without the consent of the owner of the land; and it appears to me as such to be a proper subject for an injunction." And there he distinguished between such cases and cases of ancient lights and covenants. In the former one man appropriates to himself and uses another man's property; in the latter one man does something upon his own property which exposes him to an action by another man. The Courts lean towards compensation in the latter class of cases because the wrong is done by the wrongdoer upon his own property. It would not have been a wrong but for the fact that his right of free user as owner happens to be subject to the right acquired by another man for the enjoyment of his property and restricting the absolute right of property of the former. In such a case when anything is done in violation of a right limiting another man's right of ownership, the Court naturally has to consider whether the violation can be compensated by damages. But it is a different thing when a man illegally builds upon another man's land or builds in such a way as to overhang a portion of it. There, to use the words of James, L.J., in *Goodson v. Richardson*⁽¹⁾, he is "taking that which was not his for the purpose of a profit to himself against the will of the real owner. That is taking another man's property improperly, both morally as well as legally." Relief by way of compensation in such a case is tantamount to allowing a trespasser to purchase another man's property against that man's will. On no principle of law or equity is that allowable and the current of decisions whether here or in England is opposed to it.

Another ground on which the District Judge holds that the plaintiff is entitled not to a mandatory injunction but only to nominal damages is that he (the plaintiff) has failed to prove that the superstructure of the defendant so far as it overhangs the *dhora* interferes with his light and air. But the plaintiff's

⁽¹⁾ (1874) L. R. 9 Ch. 221 at p. 223.

failure to prove that the building causes any inconvenience to him is no valid ground for depriving him of his property. His right to recover it arises out of his ownership and stands apart from any practical injury done to other property of the plaintiff by the defendant's act of continuous trespass.

We must, therefore, amend the decree of the District Judge by awarding to the plaintiff the relief claimed in prayer No. 3 of his plaint. Each party to bear his own costs throughout.

BATTY, J.:—I concur.

Decree amended.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Kt., Chief Justice, and Mr. Justice Chandavarkar.

THE HONOURABLE LAKHAMGAVDA BASAPRABHU (ORIGINAL PLAINTIFF),
APPELLANT, *v.* KESHAV ANNAJI KULKARNI AND OTHERS (ORIGINAL
DEFENDANTS), RESPONDENTS.*

1901.

December 9.

Service Inám—Lands—Resumption.

The combination of an interest in land and an obligation as to service may fall under three heads, *viz.* : (1) there may be a grant of land burdened with service, (2) there may be a grant in consideration of past and future service, and (3) there may be the grant of an office the services attached to which are remunerated by an interest in land. In either of the first two classes of grants it may be made a condition that the interest in the land should cease when the services are no longer required, but in the absence of a provision to that effect lands held under those grants are not resumable at will.

Where a plaintiff Inámdár asserts that he has a right to resume, he has to establish that the combination is such as permits of resumption and where there has been long and undisturbed possession enjoyed by the defendant and his predecessors, it will require strong evidence on plaintiff's part to make out his case.

APPEAL against the decision of Gangadhar V. Limaye, First Class Subordinate Judge of Belgaum, in Suit No. 393 of 1893.

Suit by an Inámdár to resume lands alleged to be held by defendants on service tenure.

* Appeal No. 16 of 1893.

1901.

LAKHAM-
GAYDA
v.
KESHAV
ANNAJI,

The plaintiff sued to recover possession of certain fields with mesne profits, alleging that the lands were given to one Venkatrao Shankar as remuneration for his services ; that his services were dispensed with ; that he was, in October, 1881, served with notice to restore the lands ; that he died without issue ; and that the defendants, 1—20 in all, were in wrongful possession of the lands.

Defendant 4, Bhimrav Apaji, contended *inter alia* that the lands were not given to Venkatrao for service, nor did he render service to the plaintiff's family on account of the lands. They were granted in inám to Venkatrao's ancestor, Narhar Balaji, about a century ago. The inám was enjoyed by Venkatrao's family as private property, and the *judi* (quit-rent) was paid for it by the same family all along. The lands were sold at auction for Venkatrao's debts and the defendant purchased them and got possession of the same in September, 1890. The claim was time-barred.

Defendants 6, 7 and 9, in addition to the contention of defendant 4, stated that the said Venkatrao Shankar had a brother Govindrao, who had separated from him and had his lands separately registered ; that Govindrao's wife Mhalsabai, defendant 3, and Ramchandra Govind, the natural father of her adopted son, defendant 11, sold to the defendants a portion of the lands in dispute for Rs. 400 ; and that the aforesaid persons had also mortgaged with possession some land to defendant 9.

Defendant 11 appeared but presented no written statement.

The other defendants were absent.

The Subordinate Judge found that the lands in suit were not given to Venkatrao Shankar for service ; that they were given in gift to Venkatrao's ancestor Narhar, to which no service was attached, and that Venkatrao did not render any service for the lands. He therefore dismissed the suit.

The plaintiff appealed.

Robertson (and *Setalvad* with *Ráo Bahádur V. J. Kirtikar*, Government Pleader, *S. S. Patkar* and *R. W. Desai*) for the appellants (plaintiff).

Branson (and *P. M. Mehta* with *B. A. Bhagavat*) for respondent 4 (defendant 4).

K. H. Kelkar for respondent 9 (defendant 9).

M. V. Bhat for respondent 12 (defendant 12).

1901.

LAKHAM-
GAVDA
v.
KESHAV
ANNAJI.

JENKINS, C. J.:—The plaintiff has brought this suit to recover possession of certain lands and for incidental relief. He alleges that the lands were granted by his ancestors to the ancestors of Venkatrao Shankar in consideration of service; that as the services of Venkatrao were no longer necessary, they were dispensed with; and that notice requiring delivery of possession was given, which reached Venkatrao on the 18th October, 1881.

The 4th defendant (who has been throughout the plaintiff's principal opponent, and to whom we will hereafter refer as the defendant) in his written statement denied that the lands were given for service, and asserted that they were granted in inám more than a century ago. This suit was commenced on the 6th October, 1893, and resulted in a dismissal; hence this present appeal.

The case was heard by the First Class Subordinate Judge of Belgaum, who has delivered a most careful and critical judgment, discussing in minute detail the various items of evidence submitted for his consideration. Mr. Setalvad, who has appeared before us for the appellant, has designedly not attempted to deal in detail with the judgment under appeal; he has simply placed before us what he considered to be the strongest points in his favour, conceding that if they did not satisfy us as to the merits of his case, it would be useless to answer *seriatim* the several points adverse to his claim formulated by the Subordinate Judge. Therefore we will deal with the case as it was presented before us. It is established by the evidence that for upwards of a century the plaintiff lands have been enjoyed by the defendant and his predecessors in title, and we have no doubt that this enjoyment has been under a sanad conferring a title to the lands. The question is what that title is? The plaintiff contends that the lands were given for service; that the service has been dispensed with and that, as a result, he is entitled to resume the land. The defendant, on the other hand, maintains that it was given as Sarv Inám to be continued to the grantee and his heirs from generation to generation. Under these circumstances the

1901.

LAKHAM-
GAYDA
v.
KESHAV
ANNAJI.

Subordinate Judge thus formulated the matter in contest between the parties : "The main issue involved in the case is whether, as alleged by the plaintiff, the lands were given for service and are therefore liable to be resumed at will." The conclusion at which the Subordinate Judge arrived was that the grant was a free gift. In the view we take of the case it is unnecessary to hold that the tenure is unconnected with all service ; for we think that service may be so connected with the tenure of land as that the power of resumption does not exist.

This is very clearly illustrated by the decision of the Privy Council in *Forbes v. Meer Mahomed Tuquee*⁽¹⁾. There the plaintiff sought to resume the land on the ground that the services in respect of which it was granted were no longer required.

In the course of the judgment their Lordships, in reference to a passage cited from the report of *Bhugoo Rae v. Azim Alli Khan*,⁽²⁾ say :—

"To this ruling, if it be understood to mean only that where the continued performance of certain services is, upon the true construction of the grant, the condition on which the lands are to be held, their Lordships conceive no exception can be taken ; but if it means that whenever service enters into the motive or consideration for a grant, the grant will become void if for any reason the service ceases to be performed, their Lordships think that the proposition is far too wide.

"The conclusion which they would draw from the decided cases, as well as from the reasons of the thing, is, that in every case the right to resume must depend in a great measure upon the nature of the particular tenure, or the terms of the particular grant.

"They agree with the observation of Mr. Justice Jackson, Weekly Reporter, Vol. 6, p. 209, that there is a clear distinction between the grant of an estate burdened with a certain service and the grant of an office the performance of whose duties are remunerated by the use of certain lands.

"They have already stated that, in their opinion, the grant in question does not fall within the latter category.

⁽¹⁾ (1870) 13 Moore's I. A. 438.

⁽²⁾ (1858) Sadder Dewani Adt. p. 84.

1901.

LAKHAM-
GAVDA
v.
KESHAV
ANNAJI.

"Assuming it to be a grant of the former kind, their Lordships do not dispute that it might have been so expressed as to make the continued performance of the services a condition to the continuance of the tenure. But in such a case, either the continued performance of the service would be the whole motive to, and consideration for, the grant, or the instrument would, by express words, declare that, the service ceasing, the tenure should determine."⁽¹⁾

Their Lordships also refer with approval to what has been laid down by the Chief Justice Sir Barnes Peacock in *Baboo Kooladeep v. Mahadev Sing*⁽²⁾. The cases appear to us to establish that the combination of an interest in land and an obligation as to service may fall at least under three heads; there may be a grant of land burdened with service, there may be a grant in consideration of past and future services, and there may be the grant of an office the services attached to which are remunerated by an interest in land.

It may no doubt be made a condition of either of the first two classes of grants that the interest in the land should cease when the services are no longer required, but in the absence of a provision to that effect lands held under those grants are not resumable at will. The plaintiff here asserts that he has a right to resume, therefore, he has to establish that in this case the combination (for we will assume in his favour a liability to service) is such as permits of resumption, and in view of the long and undisturbed possession enjoyed by the defendant and his predecessors, it will require strong evidence on his part to make out his case.

[The Court then proceeded to dispose of the case on its merits and on the whole arrived at the same conclusion as the Subordinate Judge.]

Decree confirmed.

(1) (1870) 13 Moo. I. A. p. 464.

(2) (1886) 6 W. R. (Civ. Rul.) 199.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

1904.
January 14.

RAICHAND MOTICHAND (ORIGINAL PLAINTIFF), APPLICANT, v.
NARAN BHIKHA (ORIGINAL DEFENDANT), OPPONENT.*

Civil Procedure Code (Act XIV of 1882), section 257-A—Evidence Act (I of 1872), section 92—Execution of decree—Agreement—Khata—Decision on a point not raised by the defendant.

It is not open to a Judge to decide a case in defendant's favour on a point not raised by him with the result that if the decision be upheld it will cast upon the defendant a far higher liability than if he had made the order which the plaintiff had asked for.

In an execution proceeding the parties arrived at an agreement in satisfaction of the decree. The agreement was in the form of a *khata*. Subsequently the plaintiff brought a suit on the *khata* and claimed interest on the amount in suit. A question having arisen in the suit as to whether the *khata* sued on was enforceable,

Held, allowing the claim for the principal amount only, that if there was an agreement to pay interest then either it was a part of the agreement embodied in the *khata*, or was a separable agreement. If it was a part of the agreement to be embodied in the *khata*, then under section 92 of the Evidence Act (I of 1872), evidence of it was not admissible. If it was a separate agreement, then it would not vitiate the agreement embodied in the *khata*, which, apart from the separate oral agreement, could not be open to objection under section 257-A of the Civil Procedure Code (Act XIV of 1882).

Bhagchand v. Radhakisan⁽¹⁾ followed.

APPLICATION under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of Mohanrai D., Subordinate Judge of Bulsar, in the Surat District, in Small Cause Suit No. 1338 of 1902.

The plaintiff sued in the Court of the Subordinate Judge of Bulsar in his Small Cause Jurisdiction to recover Rs. 102-8-0 due on a *khata* dated the 25th October, 1902. The *khata* was for Rs. 101 and Rs. 1-8-0 were claimed for interest. The *khata* was passed by the defendant in satisfaction of a decree in execution proceedings and it ran as follows :—

* Application No. 297 of 1903 under the extraordinary jurisdiction.

(1) (1903) 28 Bom. 62; 5 Bom. L. R. 672.

The account of Kanbi Naran Bhikha of the village of Kalwada (opened) on the 9th day of Aso Vad of the (Samvat) year 1958 (25th October, 1902).

Cr. _____ Rs. a. p. Dr. _____ Rs. a. p.

1904.
RAICHAND
v.
NARAN.

On the 9th day of Aso Vad (25th October, 1902) a decree (bearing number 784 of 1898 was passed in your favour against my deceased father Bhikha Gowan, for (execution of) which Darkhast number 779 was preferred. Having this day given a *kabulat* in respect of the same for Rs. 101, I have written and passed this *khata* in my name. Therefore this day the above-mentioned sum of Rs. 101, namely, one hundred and one, has become payable by me to you. By (my) own hands (this *khata* is opened). The handwriting of Dayabhai Nanabhai; (written) at the request of the party.

101 0 0

Naran Bhikha; my signature; (my) own handwriting. I agree (to pay) the abovementioned sum of rupees one hundred and one. My own handwriting.

101 0 0

The defendant admitted the *khata* as well as the claim.

At the hearing the Subordinate Judge raised an issue:—Is the document in suit enforceable at law? He found on the issue in the negative and dismissed the suit on the following grounds:—

Turning then to the merits it is scarcely necessary to point out that the present case is governed by the 2nd clause and not the 1st of section 257-A., Civil Procedure Code, and that neither the Bombay nor the Madras decision quoted for the plaintiff (25 Bombay 252; 26 Madras 19) can thus come into play in the present instance.

In these circumstances the interest not allowed by the decree being on plaintiff's own admission chargeable at 9 per cent. per annum according to their then agreement—*vide* Exhibit 23,—*cf.* defendant's admission of this claim with interest as preferred in Exhibit 5. I feel that the case is clearly within the spirit of section 257-A, clause 2, Civil Procedure Code, and that the necessary sanction having in consequence been previously refused in the matter, *vide* Exhibit 24, the present claim based on any such *khata* is doubtless not at all sustainable at law: (*cf.* 27 Bombay 96). It has been said that Exhibit 19, the document in suit, does not expressly provide for interest in writing, but then it is enough to note that it is never usual to do so in cases of bare

1904.

RAICHEAND
v.
NABAN.

*khata*s of the kind originally written out as such and that the claim about interest in the plaint taken with the plaintiff's prior statement, Exhibit 23, and defendant's present admission, Exhibit 5, about the same is, in my opinion, sufficient to bring the case within the purview of the clause aforesaid—the attempt on the part of the plaintiff since to withdraw from that portion of the claim or to contradict his own previous admission apart from the permissibility of the cause not evidently helping him in the direction indicated, not to say of Exhibit 17 rendering the agreement void under section 257-A., clause 1, Civil Procedure Code.

The plaintiff preferred an application under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882), urging *inter alia* that the Judge acted contrary to law in applying the provisions of section 257-A. of the Civil Procedure Code and in holding that the *khata* in suit was not enforceable at law; that the Judge should have held that the *khata* in suit was passed in satisfaction of the decree and did not contravene the provisions of section 257-A., clause 2; that the Judge erred in rejecting the plaintiff's claim in face of the defendant's admission of the *khata* and the claim; that as the Court struck off the execution-proceeding on the statement of the parties that the decree was satisfied, it should have been held that the Court's order amounted to sanction and any order in the subsequent proceeding did not affect the plaintiff's right under the *khata*; and that the Judge should have held that the alleged stipulation to pay interest was a separable agreement which did not invalidate the claim *in toto*. A *rule nisi* having been issued calling on the defendant to show cause why the decision of the Subordinate Judge should not be set aside,

N. V. Gokhale appeared for the applicant (plaintiff) in support of the rule :—The *khata* contains no stipulation for the payment of interest. It does not extend the time for the execution of the decree, nor does it provide for the payment of a sum in excess of the decretal amount. On the contrary it provides for the payment of a smaller sum. Thus the provisions of section 257-A. of the Civil Procedure Code are not applicable. We had claimed interest in the plaint according to the usual mercantile custom and not on account of any agreement to pay it. Further we had even applied to the Court relinquishing the claim for interest. Supposing that there was an oral agreement

to charge interest, that part of the agreement is severable from the written *khata* and may be held to be void, but the *khata* itself which does not provide for interest is, we submit, enforceable. The ruling in *Bhagchand v. Radhakisan*⁽¹⁾ is on all fours.

1904.

RAICHAND
G.
NARAN.

N. K. Desai appeared for the opponent (defendant) to show cause :—The plaintiff admitted in Exhibit 23 that there was an oral agreement to charge interest though he afterwards tried to relinquish his claim for it. The agreement to pay interest would make the amount to be paid under the *khata* greater than the decretal amount. The provisions of section 257-A. of the Civil Procedure Code are, therefore, applicable.

The agreement to pay interest, though oral, cannot be separated from the *khata* as it was intended to run from the date of and simultaneously with the *khata*.

The object of section 257-A of the Civil Procedure Code is to prevent a judgment-creditor from taking any undue advantage over the judgment-debtor and to prevent multiplicity of suits. This object of the section will be frustrated if parties be allowed to intermeddle with the decree of the Court without its sanction and the same subject-matter be allowed to be brought before the Court in different proceedings in different forms : *Heera Nema v. Pestonji*⁽²⁾.

JENKINS, C. J. :—The Judge on a point not raised by the defendant has decided this case in the defendant's favour with the result that, if his decision is upheld, it will cast upon the defendant a far larger pecuniary liability than if he had made the order which in these proceedings the plaintiff asks for. We think, however, we can release the defendant from the position in which he has thus been placed.

If there was an agreement to pay interest (which we very much doubt) then it either was a part of the agreement embodied in the *khata*, or it was a separate agreement. If it was a part of the agreement to be embodied in the *khata*, then under section 92 of the Evidence Act, evidence of it was not admissible. If it was a separate agreement, then on the authority of *Bhagchand v. Radhakisan*,⁽¹⁾ it would not vitiate the agreement embodied in

⁽¹⁾ (1903) 23 Bom. 62; 5 Bom. L. R. 672. ⁽²⁾ (1898) 22 Bom. 693.

1904.

RAICHAND

v.
NARAN.

the *khata*, which apart from this supposed oral agreement would not be open to objection under section 257-A of the Civil Procedure Code.

We, therefore, make the rule absolute and pass a decree in the plaintiff's favour for Rs. 101. The plaintiff to get the costs of the Court below but not the costs in this Court.

Rule made absolute.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Aston.

1904.

January 12.

SHIVABHAJAN DURGAPRASAD (ORIGINAL PLAINTIFF), APPELLANT, v.
SECRETARY OF STATE FOR INDIA: (ORIGINAL DEFENDANT 2), RESPONDENT.*

Statute 21 and 22 Vict., c. 106, sections 41, 42 and 65—Secretary of State in Council—Negligence of Chief Constable—Suit to recover damages—"Liabilities lawfully contracted and incurred"—Construction.

In a suit instituted against the Secretary of State in Council to recover damages on account of the negligence of a Chief Constable with respect to goods seized, it was contended that the liability of the Secretary of State in Council is to be determined with reference to what would have been the liability of the East India Company, were it still in existence,

Held, that the suit was not maintainable inasmuch as the Chief Constable seized the goods not in obedience to an order of the executive Government but in performance of a statutory power vested in him by the Legislature, for the appointment of the Chief Constable was not made by the Bombay Government, but by an officer clothed by the Legislature with power in that behalf; the seizure of the goods was not in any sense productive of benefit to the Revenues of the Bombay Government, nor was it a transaction out of which profit could be derived and there had been no ratification or adoption of the act.

The term "Government of India" in section 42 of the Statute points to its bearing the meaning, not of the Governor General in Council, but of the superintendence, direction and control of the country.

The words of sections 42 and 65 are capable of the construction that the reference in them to the East India Company is in case of the earlier section to furnish a clue to the character of the charge, rather than to the conditions which can bring it into being, and in the later section to indicate the mode in which the liability may be enforced, and not the circumstances under which it may be incurred.

* Appeal No. 6 of 1903.

In order that a suit should lie against the Secretary of State in Council, it must be one in which the East India Company might have been made liable and the liability alleged must be one incurred on account of the Government of India. In such a suit the plaintiff must, in order that he should succeed, establish that the liability was incurred on account of the Government of India, so that he must show that it was incurred by some one competent for that purpose.

Before it can be said that a liability on account of the Government of India had been incurred by the Bombay Government as the result of the act or omission of the Chief Constable, so as to be chargeable on the revenues, it would be necessary to exclude those conditions which afford a principal exemption from liability for the act of an agent. But it is settled law that "where the duty to be performed is imposed by law and not by the will of the party employing the agent, the employer is not liable for the wrong done by the agent in such employment."

APPEAL against the decision of R. S. Tipnis, District Judge of Thána, in original suit No. 3 of 1901.

Suit against the Secretary of State for India in Council to recover damages for seizure of goods by a Chief Constable.

The plaintiff sued to recover Rs. 293-12-10 from the defendants, alleging that 62,500 bundles of hay were attached by defendant 1, Vithal Lakshman, the Chief Constable of Máhim, in the beginning of November, 1900, while the hay was in plaintiff's possession, that on the 2nd January, 1901, the plaintiff gave a notice to the District Superintendent of Police, Thána, for delivery of possession of the said quantity of hay, but only 14,700 bundles were delivered and the remaining 47,800 were not given over to the plaintiff, that defendant 1, the Chief Constable, attached the hay in his capacity as a public servant, that defendant 1 and his superior officers were given due notice of the plaintiff's intention to file a suit to recover damages, that as the Chief Constable was a Government servant and Government was the principal and was liable for the act of their agent, the Secretary of State for India in Council was made a party to the suit after due intimation to the Collector, and that both the Chief Constable and the Secretary of State for India in Council were liable to pay the price of 47,800 bundles of hay at rupees six per 1,000 bundles, with interest.

Defendant 1, Vithal Lakshman, replied that he was unnecessarily joined and that plaintiff had no cause of action against him inasmuch as he was not the Chief Constable at Máhim at

1904.

SHIVABHAJAN
v.
SECRETARY
OF STATE
FOR INDIA.

1904.

SHIVABHAJAN

v.

SECRETARY
OF STATE
FOR INDIA.

the time the plaintiff's hay was attached or returned to him. Pending suit defendant 1 died and his heirs were not brought on the record. The suit, therefore, proceeded against defendant 2, the Secretary of State for India in Council, alone.

Defendant 2 contended that the plaintiff had not suffered any loss as alleged, he or his servants having clandestinely and wrongfully removed the missing bundles, that the Revenue Pátíl, Ramji Hari, into whose charge the hay was given, was bound to take care of it as ordered by the Head Constable, Lakshman Daji, and if the plaintiff succeeded in proving the loss as alleged by him nobody else but the Revenue Pátíl would be responsible if it was caused by his fault or negligence, and that the Secretary of State for India in Council was not liable for the Revenue Pátíl's negligence, if any, in guarding the hay because his omission to take proper steps for its security was not for the benefit of Government, nor had Government derived any profit therefrom.

The Judge found that the Chief Constable of Máhím did attach from plaintiff's possession 62,500 bundles of hay in his official capacity as a public servant, that defendant 1, Vithal Lakshman, was not then the Chief Constable of Máhím and was not in any way concerned with the attachment and was not liable to plaintiff's claim, that 14,700 bundles of hay were returned to plaintiff by Head Constable Lakshman Daji on behalf of the Chief Constable of Máhím and by his order because the attachment on the hay had been raised, that the plaintiff or his servants had not clandestinely or wrongfully removed 47,800 bundles of hay or any portion thereof while the hay was under attachment or at any subsequent time, that 47,800 bundles of hay were not returned to plaintiff by the Chief Constable of Máhím, because they were lost and not available for delivery, that the loss took place in consequence of the negligence of the Chief Constable of Máhím, who ratified the act of his Head Constable, Lakshman Daji, in omitting to take proper security from Ramji Hari Patil in whose charge the hay was given and in omitting to supervise its safe custody, but the loss was not occasioned by any negligence or laches of defendants 1 and 2, that the hay was given in Ramji Pátíl's charge by Head Constable Lakshman without plaintiff's consent and this act of Lakshman was ratified by the Chief Constable of Máhím, that

the negligence of the Revenue Pátíl, Ramji, in not properly taking care of the hay and thereby causing loss to the plaintiff was proved, and that the defendants were not liable to make good the loss occasioned by the fault or negligence of Ramji Pátíl. On the above findings the Judge dismissed the suit.

The plaintiff appealed.

G. S. Rao appeared for the appellant (plaintiff):—It is a rule of Municipal law that a sovereign is not liable to be sued in his own Courts except with his consent. This rule does not apply to the Secretary of State for India. His liability to be sued in the Courts in British India is determined by 21 and 22 Vict., c. 106, section 65. He is liable to the same extent as the East India Company would have been liable: see the Preamble of Bengal Regulation III of 1793, which shows the policy deliberately adopted at that period, and the same principle generally applied throughout the territories of the Company.

The East India Company was invested with powers of two-fold character, *viz.*, (1) the power to carry on trade as merchants, and (2) the power to acquire and govern territory, to raise and maintain armed forces and to make peace or war with Native States. Acts done in the execution of these sovereign powers are not subject to the control of the Municipal Courts. But acts done under the sanction of the Municipal law and in the exercise of the powers conferred by that law are subject to the control of the Municipal Courts, although the acts are done by the sovereign power or its deputy: *P. & O. S. N. Company v. The Secretary of State for India* ⁽¹⁾; *Forester v. The Secretary of State for India* ⁽²⁾; *Hari Bhanji v. The Secretary of State for India* ⁽³⁾ upheld in appeal; *The Secretary of State for India v. Hari Bhanji* ⁽⁴⁾; *Barwick v. English Joint Stock Bank* ⁽⁵⁾.

Whether the master does or does not derive benefit from the act of the servant or deputy, the liability of the master remains unaffected: *British Mutual Banking Company v. Charnwood Forest Railway Company* ⁽⁶⁾.

(1) (1861) 5 Bom. H. C. R., Appx. 1.

(2) (1872) L. A. Sup. Vol., pp. 13, 17.

(3) (1879) 4 Mad., 344.

(4) (1882) 5 Mad., 273.

(5) (1867) L. R. 2 Ex., 259.

(6) (1887) 18 Q. B. D. 714 at p. 717.

1904.

SHIVAJIHAJAN
O.
SECRETARY
OF STATE
FOR INDIA.

1904.

SHIVABHAJAN

v.
SECRETARY
OF STATE
FOR INDIA.

Scott (Advocate General with *Ráo Bahádur V. J. Kirtikar*, Government Pleader) for the respondent (defendant 2):—A suit like the present cannot lie against the Secretary of State for India. The Secretary of State, whenever he acts either himself or through his officers, acts as a sovereign power and no suit can lie against him in respect of such acts except when he has expressly allowed it: *P. & O. S. N. Company v. The Secretary of State for India* ⁽¹⁾ supports this view.

The East India Company had sovereign powers by delegation and they had also other powers. They could be sued with respect to the acts done by them in virtue of the other powers, but not with respect to the acts done by them under the sovereign powers: *Grant v. The Secretary of State for India in Council* ⁽²⁾; *Thomas Eales Rogers v. Rajendro Dutt* ⁽³⁾; *Doss v. The Secretary of State for India in Council* ⁽⁴⁾.

The Chief Constable had no authority to appoint Ramji as the custodian of hay. No section of the Criminal Procedure Code gave him that power.

G. S. Rao, in reply:—Sections 500 and 165 of the Criminal Procedure Code authorized the Chief Constable to attach the hay and he was bound to take proper care. We rely on *The Secretary of State in Council of India v. Kamuckee Boye Sahaba* ⁽⁵⁾, which was the case of an act of State, namely, annexation. Articles 15—18, schedule II of the Limitation Act, clearly show that suits can lie against Government. See also *Vijaya Ragava v. Secretary of State for India* ⁽⁶⁾.

JENKINS, C. J.:—This is an appeal from a decree of the District Judge at Thána, in which a question of considerable importance is raised, as the purpose of the suit is to render the Secretary of State in Council liable for the negligence of a Chief Constable. The claim arises out of the seizure by the Chief Constable of 62,500 bundles of hay in the possession of the plaintiff, and the occasion of this seizure was that complaints had been lodged against the plaintiff of his having stolen the hay.

The charge of theft was not sustained, and when the plaintiff demanded a return of the hay, 14,700 bundles only were restored

(1) (1872) I. A. Sup. Vol., pp. 13, 17.

(2) (1877) 2 C. P. D., 445.

(3) (1860) 2 W. R. (P. C.), 51, 52.

(4) (1875) L. R. 19 Eq. 509.

(5) (1859) 7 Moore's I. A., 476.

(6) (1884) 7 Mad., 466.

to him. This suit has been brought in respect of the balance of 47,800. It has been found by the District Judge, that the 47,800 bundles of hay were not returned to the plaintiff by the Chief Constable of Máhím because they were lost and not available for delivery; that this loss took place in consequence of the negligence of the Chief Constable of Máhím "who ratified the act of his Head Constable Lakshman in omitting to take proper security from Ramji Pátíl in whose charge the hay was given and in omitting to supervise its safe custody: but the loss was not occasioned by any laches or negligence of defendants 1 and 2." The case has been argued before us on the basis of these findings, which we, therefore, accept for the purpose of this decision without expressing any opinion as to their correctness and without any regard to any defect there may be in the plaintiff's pleading. Defendant No. 2 is the Secretary of State for India in Council, against whom alone the plaintiff now makes his claim. The Secretary of State in Council had no direct concern with the matter of which complaint is made, and he is sued by virtue of the provisions contained in the Statute 21 and 22 Vic., c. 106.

It has been argued before us that the liability of the Secretary of State in Council is to be determined by reference to what would have been the liability of the East India Company, were it still in existence.

But as the present suit is brought against the Secretary of State in Council to charge the revenues of India with a liability alleged to have been incurred, we propose to examine the terms of 21 & 22 Vic., c. 106; for it is under that Statute that the revenues can be charged, and that the suit is brought: *Sanitary Commissioners of Gibraltar v. Orfila* ⁽¹⁾. The scheme of the Statute in this respect appears to be that it indicates first, the circumstances under which a liability may become chargeable upon the revenues of India, and secondly, the method whereby the liability (if it exists) can be enforced.

After providing for (a) the transfer of the Government of India to Her late Majesty and the exercise by one of the

1904.

SHIVABHAJAN

v.
SECRETARY
OF STATE
FOR INDIA.

(1) (1890) 15 App. Cas., 400.

1904.

SHIVABHAJAN

v.
SECRETARY
OF STATE
FOR INDIA.

Principal Secretaries of State of the Powers then exercised by the East India Company, (b) the establishment of the Council of India, and (c) the transfer to Her late Majesty of the real and personal estate of the Company, it is by the 41st section provided that the expenditure of the revenues of India both in India and elsewhere shall be subject to the control of the Secretary of State in Council. Then by the 42nd section it is provided that "all the bond, debenture, and other debt of the said Company in Great Britain, and all the territorial debt and all other debts of the said Company, and all sums of money, costs, charges and expenses which if this Act had not been passed would after the time appointed for the commencement thereof have been payable by the said Company out of the revenues of India, in respect or by reason of any treaties, covenants, contracts, grants or liabilities then existing, and all expenses, debts and liabilities which after the commencement of this Act shall be lawfully contracted and incurred on account of the Government of India and all payments under this Act, shall be charged and chargeable upon the revenues of India alone, as the same would have been if this Act had not been passed, and such expenses, debts, liabilities and payments as last aforesaid had been expenses, debts and liabilities lawfully contracted and incurred by the said Company; and such revenues shall not be applied to any other purpose whatsoever:

"and all other monies vested in or arising or accruing from property or rights vested in Her Majesty under this Act, or to be received or disposed of by the Council under this Act, shall be applied in aid of such revenues."

If then the liability now under discussion falls within the section, it is because it is covered by the words "all expenses, debts and liabilities which after the commencement of this Act shall be lawfully contracted and incurred on account of the Government of India." These words have been taken from 3 & 4 Will. IV, c. 85, for we find the same expression in the 9th section of that Act. Were the matter uncovered by authority we should have been disposed to hold that the word *lawfully* qualified *incurred* as well as *contracted*, but in the *Peninsular and Oriental Steam Navigation Company v. The Secretary of State for*

India ⁽¹⁾ it was said "we are of opinion that the words 'liabilities incurred' in 3 & 4 Will. IV, c. 85, section 9, and the same words in 21 & 22 Vic., c. 103, sections 42 and 65, are not necessarily limited to liabilities arising out of contract; for if so, there was no necessity to use the word 'incurred' at all. We think the words 'expenses, debts and liabilities lawfully contracted and incurred' must be construed as 'debts lawfully contracted and expenses or liabilities incurred'." This reasoning, so far as it implies that the words *must* cover torts, seems to overlook the language of section 71 of the Act where we have the words *liability* and *incurred* used in a context in which tort has no place; nor does it appear to us that the construction there adopted was necessary (as was supposed) to support a suit in ejectment; for the relief in such a suit need not involve any charge on the revenues, but merely the recovery of property which forms no part of those revenues. The view, however, enunciated in the Peninsular and Oriental Steam Navigation Company's case has now stood so long unchallenged, that we think we ought to accept it as an authority binding on us, more especially as it was the basis of the decision in that case, where it was held that the Secretary of State in Council was liable for damages occasioned by the negligence of servants in the service of the Government. This decision proceeded on the ground that the servants were engaged on an undertaking, which might have been carried on by private individuals without the delegation of sovereign rights and that as under the like circumstances a private individual would have been liable, the Secretary of State in Council must similarly be liable. The expression *Government of India* as used in section 42 is not defined by the Statute, but, notwithstanding the sense ascribed to it by section 3 (22) of the General Clauses Act of 1897, we think its use in 21 & 22 Vic., c. 106, and in the earlier Acts 16 & 17 Vic., c. 95, 3 & 4 Will. IV, c. 85, 53 Geo. III, c. 155, and 33 Geo. III, c. 52, points to its bearing the meaning not of the Governor General in Council, but (in the phraseology of the older Acts) of the superintendence, direction and control of the country. So much for section 42; we now pass to section 65, under which the Secretary of State in Council is sued.

1904.

SHIVABHAJAN

 &
 SECRETARY
 OF STATE
 FOR INDIA.

(1) (1861) Bourke's Rep. (Part VII) 166; 5 Bom. H. C. Appx. I.

1904,

SHIVABHAJAN

THE
 SECRETARY
 OF STATE
 FOR INDIA.

That section provides "that the Secretary of State in Council shall and may sue and be sued as well in India as in England by the name of the Secretary of State in Council as a body corporate; and all persons and bodies politic shall and may have and take the same suits, remedies, and proceedings, legal and equitable, against the Secretary of State in Council of India as they could have done against the said Company;

"and the property and effects hereby vested in Her Majesty for the purposes of the Government of India, or acquired for the said purposes shall be subject and liable to the same judgments and executions as they would while vested in the said Company have been liable to in respect of debts and liabilities lawfully contracted and incurred by the said Company."

Of this section it was said by Lord Selborne in *Kinloch v. Secretary of State for India in Council* ⁽¹⁾ that it "simply enacted that suits to establish rights, which, if that Act had not been passed, would have belonged to the East India Company and for which they might have sued, and again suits to establish claims, which if that Act had not been passed would have been proper to be made in actions at law or suits in equity against the East India Company, might be brought by or against the Secretary of State for India in Council."

"The enactment seems to proceed on the same principle on which in Banking Acts public officers are authorised to sue and be sued as representing the persons really entitled or liable. This is no doubt a very high public officer: and the designation 'in Council' is added, I suppose, in order that all matters arising out of such suits may be considered not only by himself individually, but by himself in his Council. Whatever the reason for that may have been, the enactment is limited as I have expressed it; and this is clearly not a suit brought against him as representing the late East India Company, or which can by any possibility be described as a suit which, if the Indian Government Act had not been passed, might have been brought against the East India Company. Therefore so far there seems to be no ground for suing the Secretary of State for India in Council in the manner in which he is here sued." The words of sections 42

(1) (1882) 7 App. Cas. 619 at p. 622.

1904.

SHIVABHAJAN
v.
SECRETARY
OF STATE
FOR INDIA.

and 65 are possibly capable of the construction that the reference in them to the East India Company is in the case of the earlier section to furnish a clue to the character of the charge, rather than to the conditions which can bring it into being, and in the later section to indicate the mode in which liability may be enforced, and not the circumstances under which it may be incurred; but it would seem to follow from Lord Selborne's view that for this suit to lie against the Secretary of State in Council it must be one in which the East India Company might have been made liable, while section 42 imposes the further qualification that the liability alleged must be one incurred on account of the Government of India. But in *Rogers v. Rajendro Dutt* ⁽¹⁾ it appears to have been assumed that the East India Company would not be liable for the tortuous acts of their servants, in respect of which a claim for unliquidated damages was made. There a suit was brought against an officer of the East India Company to recover damages for an alleged wrongful act and one of the pleas advanced was that the act complained of was done by a Government officer on behalf of, and with the sanction of, the Government, and on it their Lordships expressed the following opinion (p. 130):—

“Neither does it seem to them to conclude the question in the action that the act complained of is to be considered the act of the Government, and that in the part which the defendant took in it he acted only as the officer of the Government, intending to discharge his duty as a public servant with perfect good faith, and with an entire absence of any malice, particular or general, against the plaintiffs. For if the act which he did was in itself wrongful as against the plaintiffs, and produced damage to them, they must have the same remedy by action against the doer, whether the act was his own, spontaneous and unauthorised, or whether it were done by the order of the superior power. *The civil irresponsibility of the Supreme power for tortuous acts could not be maintained with any show of justice, if its agents were not personally responsible for them**; in such cases the Government is morally bound to indemnify its agent and it is hard on such

(1) (1860) 8 Moo. I. A., 103.

* These words are not in italics in the Judgment quoted from. Reporter's note.

1904.

SHIVABHAJAN
v.
SECRETARY
OF STATE
FOR INDIA.

agent when this obligation is not satisfied; but the right to compensation in the party injured is paramount to this consideration."

If this be the correct view and the liability of the revenues of India are no greater under the Statute than in the time of the East India Company, it follows that the plaintiff's claim here must fail.

It is interesting in this connection to note that in 1843 it was said by Sir Erskine Perry in *Dhackjee Dadajee v. The East India Company* (1) that he could not find a single instance during the 240 years' existence of the Company as a corporation of an action having been brought against the Company for the illegal acts of the Governors and Members of Council.

There is another aspect of the case which appears to us to lead to the same result. The plaintiff to succeed must establish that this is a liability incurred on account of the Government of India, so that he must show that it was incurred by some one competent for that purpose. Therefore we must consider by whom can such a liability be incurred? There must be some limit, and the reasonable view would seem to be that, apart from the Secretary of State in Council, it can only be incurred by those in whom the governing of the country is vested. Who then are they? By section 39 of 3 & 4 Will. IV, c. 85, the superintendence, direction and control of the whole of the Civil and Military Government is vested in the Governor General of India in Council, while by section 56 of the same Act it is enacted that the executive Government of Bombay shall be administered by the Governor in Council of Bombay. In the circumstances of the present case we can confine ourselves to considering whether it can be said that the liability under discussion has been incurred by the latter of these bodies (of whom we will speak as the Bombay Government) on account of the Government of India. It is not suggested that the Bombay Government directly had any concern in the matter, but that does not dispose of the case; for the acts and omission of another may in law be equivalent of a man's own.

(1) (1843) 2 Morley's Digest 307 at p. 323.

We must therefore consider the precise position of the Chief Constable, through whose negligence their liability is in this case said to have been incurred. His grade was below that of an Inspector so that he presumably was appointed to his post by the District Superintendent as provided by section 9 of Bombay Act IV of 1890.

Then the seizure is said to have been made, not as the District Judge supposed under section 165 of the Criminal Procedure Code, but under section 550 of that Act. But it really matters little under which of these sections the seizure actually was made, for in either case it was, according to the decision *In re Ratanlal Rangildas* (1), obligatory to proceed under section 523 of the Criminal Procedure Code. Apparently this was not done.

Now it appears to me on principle that before it can be said that a liability *on account of the Government of India* has been incurred by the Bombay Government as the result of the act or omission of the Chief Constable so as to be chargeable on the revenues, it is necessary to exclude those conditions which would afford a principal exemption from liability for the act of an agent. But it is settled law that "where the duty to be performed is imposed by law and not by the will of the party employing the agent, the employer is not liable for the wrong done by the agent in such employment": *Tobin v. The Queen* (2), referred to recently in *Nireaha Tamaki v. Baker* (3).

In this case the Chief Constable seized the hay, not in obedience to an order of the executive Government, but in performance of a statutory power vested in him by the Legislature. Nor does the matter rest there; for the appointment of the Chief Constable was made not by the Bombay Government but by an officer clothed by the Legislature with a power in that behalf; the seizure of the hay was not in any sense productive of benefit to the revenues of the Bombay Government, nor was it in a transaction out of which profit could be derived; and finally there has been no ratification or adoption of the act. In the face of these facts it appears to us it would be giving the words "liability incurred on account of the Government of India" an

1901.

SHIVABHAJAN
v.
SECRETARY
OF STATE
FOR INDIA.

(1) (1892) 17 Bom. 748 at p. 751.

(2) (1864) 33 L. J. C. P., 199 at p. 204.

(3) (1901) A. C., 561 at p. 575.

1904.

SHIVABHAJAN

v.

SECRETARY
OF STATE
FOR INDIA.

application that could not have been intended were we to hold that under the circumstances we have described there has been a liability incurred on account of the Government of India and chargeable on the revenues under 21 and 22 Vic., c. 106. For these reasons we confirm the decree of the District Court with costs.

Decree confirmed.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

1904.

January 12.

DALSUKHRAM HARGOVANDAS (ORIGINAL PLAINTIFF), APPELLANT,
v. CHARLES DEBRETTON (ORIGINAL DEFENDANT), RESPONDENT *

*Contract Act (IX of 1872), section 23—Agreement to stifle a prosecution—
Compounding a non-compoundable offence—Agreement as defence in a civil
action—Suit for wrongful confinement.*

The plaintiff sued the defendant in damages for wrongful arrest and confinement. The defence pleaded an agreement whereby the parties had agreed to settle their differences in consideration of compounding some criminal charges, one of which was not by law compoundable and which were then pending between the parties in a Criminal Court. The Lower Appellate Court held that the plaintiff was prevented from bringing the action by reason of the agreement. On appeal—

Held, that the object of the agreement being to stifle a prosecution was bad in law, and that the agreement, therefore, could not be set up as a defence in a Court of law.

SECOND appeal from the decision of S. L. Batchelor, District Judge of Ahmedabad, reversing the decree passed by Vadilal Tarachand Parekh, Joint Subordinate Judge at Ahmedabad.

Suit for damages.

The plaintiff sued to recover Rs. 2,000 as damages for wrongful assault, arrest and confinement.

The defendant pleaded *inter alia* that the plaintiff had trespassed on his land, that the acts complained of having been done by his servants, he was not liable for their *bona fide* mistake,

* Second Appeal No. 273 of 1903.

and that this action could not lie as plaintiff had agreed to settle amicably the differences between the parties by compounding the criminal charges that were then pending between the parties. The Subordinate Judge held that the plaintiff was wrongfully arrested and imprisoned and assaulted by the defendant's servants, that the plaintiff had unwittingly trespassed on defendant's land, that the defendant was liable to pay Rs. 500 as damages to plaintiff and that the plaintiff did apologise to defendant for his acts, but he was not thereby prevented from recovering the damages.

On appeal the District Judge agreed with the Subordinate Judge in holding that the plaintiff was arrested and imprisoned by the servants of the defendant, and that the defendant was liable for his servants' acts; but differed from him in holding that the plaintiff was debarred from bringing the suit by reason of the agreement arrived at between the parties. The plaintiff's suit was consequently dismissed.

The plaintiff appealed to the High Court.

Branson (with him *Bhaishankar, Kanga and Girdharlal*), for the appellant (plaintiff).

There was no appearance on behalf of the respondent.

CHANDAVARKAR, J.:—The District Judge has found that the plaintiff (appellant) was wrongfully arrested and imprisoned by the servants of the defendant (respondent) and that the defendant is liable for his servants' acts. But the District Judge has rejected the plaintiff's claim for damages on the ground that he "is prevented from bringing this action by reason of the private settlement effected in the course of the criminal proceedings" which had been taken by both the parties. These proceedings resulted in an order of acquittal passed by the Magistrate before whom they were taken on representations made by both parties that they had amicably settled their disputes and agreed to withdraw the respective complaints. It was admitted before the District Judge by plaintiff's Counsel that "it was a general agreement between plaintiff's party and defendant to compose all the differences between them arising out of the incidents of the evening of 3rd February 1900." In other words, the agreement

1904.

DALSUKHRAM

v.

CHARLES
DEBRETTON.

1904.

DALSUKHRAM
v.
CHARLES
DEBRETTON.

between the parties was substantially, as found by the District Judge, that the plaintiff should give up all claims against the defendant for the defendant's illegal act in consideration of the defendant withdrawing his complaint. It was urged before the District Judge by plaintiff's Counsel that this agreement was void because it was based upon an unlawful consideration, namely, a promise to stifle a prosecution. The District Judge has, however, overruled the contention, holding that the principle of law that agreements based upon a promise to stifle a prosecution are void, cannot apply where "the injury inflicted," as the learned Judge puts it, "concerns the individual only and has no reference to the interests of the State." No exception can be taken to this view of the District Judge, but we cannot agree with him when he goes on to hold that "the compoundability or uncompoundability" under our Criminal Procedure Code "of the offence charged" is not the sole or decisive test of whether the offence implies an injury concerning the individual only, having no reference to the interests of the State. The prosecution of the plaintiff and eight others was under section 143, Indian Penal Code, for the offence of having been members of an unlawful assembly and under section 447, Indian Penal Code, for criminal trespass. A complaint for the former offence is not, according to the Criminal Procedure Code, compoundable. The Legislature has laid down in that Code the test for determining the class of offences which concern individuals only as distinguished from those which have reference to the interests of the State; and Courts of law cannot go beyond that test and substitute for it one of their own.

It may be, as observed by the District Judge, that the prosecution was in reality a private prosecution and that it was the Police, not the defendant, who must be held responsible for the specification of the offence under section 143 of the Indian Penal Code in the charge sheet. But that circumstance cannot affect the question whether the defendant, after having given information to the Police and led them to prosecute the plaintiff and others for two offences, one of which was non-compoundable and concerned the interests of the State, could legally enter into a contract not to lead evidence in the criminal case in considera-

tion of the accused (*i.e.*, the plaintiff) giving up all claims for damages against him. Whether rightly or wrongly, the plaintiff stood charged with the offence of being a member of an unlawful assembly; and the defendant could not enter into a valid and binding agreement the object of which was to stifle the prosecution.

1904.

DALSUKHRAM

v.

CHARLES
DEBRETTON.

Next, the District Judge observes:—"The authorities relied upon only lay down the rule that a plaintiff cannot succeed who sues to enforce an agreement based upon his promise to stifle a prosecution concerning public interests." This, we think, is not an accurate statement of the law. The law is laid down in section 23 of the Indian Contract Act: "Every agreement of which the object or consideration is unlawful is void." The agreement is opposed to public policy and cannot be recognized in any way.

The plaintiff sues for damages for a tort committed by the defendant's servants on his person. The defendant pleads in answer an agreement which is void. The agreement on which the defence rests being illegal is out of the case and the plaintiff is entitled to the damages he claims unless there are circumstances independent of the agreement, to deprive the plaintiff of them. This is a question which we cannot decide in second appeal. The District Judge has no doubt in the concluding paragraph of his judgment added:—"If plaintiff were to be considered technically entitled to damages, I should be unable to award him more than a nominal sum"; but he has not specified the sum which he would have awarded in that view of the case. As the District Judge has dismissed the suit substantially on the preliminary ground that it is not maintainable and as that ground is not, in our opinion, correct in law, we reverse the decree and remand the appeal for determination on merits. Costs to abide the result.

Decree reversed. Case remanded.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

1904.
January 18.

SONU VISHRAM CHAWAN (ORIGINAL PLAINTIFF), APPELLANT, *v.*
DHONDU VISHRAM CHAWAN (ORIGINAL DEFENDANT), RESPONDENT.*

*Partition—Joint Property—Minor Coparceners—Guardian's defalcations
respecting joint property—Minor's share.*

In a partition suit, the minor plaintiff's share ought not to be burdened with the liabilities of his guardian, merely because his guardian committed defalcations in respect of the joint property of the parties to the suit, in the absence of any allegation or proof that the plaintiff had derived benefit therefrom.

SECOND appeal from the decision of T. Walker, District Judge of Ratnágiri, confirming the decree passed by Mahadev Shridhar, First Class Subordinate Judge of Ratnágiri.

Suit for partition.

The plaintiff, a minor, represented by his mother Savitri, brought a suit against the defendant (his step-brother) to recover on partition his share in the estate of his deceased father.

The defendant contended (*inter alia*) that the plaintiff's mother who was in possession of a portion of the deceased's property had tampered with the property, and that he had no objection to a partition of the whole property inclusive of that in the plaintiff's possession.

The Subordinate Judge came to the conclusion that Savitri had committed defalcations in respect of the joint property and passed the following decree :—

"I decree that plaintiff pay defendant one-half of Rs. 1,092, i.e., Rs. 546 for his share of the cash and other moveable property within one year from to-day.....when plaintiff shall have paid the amount as above within the fixed time, he should recover, by fair partition, a half share of the immoveable property specified in the plaint and of the outstanding debts due on Exhibits 16 and 37. Should plaintiff fail to pay the amount as above within the time appointed, his suit shall stand dismissed."

This decree was confirmed, on appeal, by the District Judge, whose reasons were :—

* Second Appeal No. 645 of 1902.

"I am asked to consider whether the minor's share should be burdened and embarrassed by the defalcations of his mother. I need not consider what would have been a proper course to pursue had Savitri, instead of suing as guardian of the minor, been a party in her personal capacity. It seems to me that the minor must be left to any remedy he may have by a separate suit against the mother should he afterwards care to bring it."

The plaintiff appealed to the High Court contending that there was no allegation and no finding, nor were there any materials to justify one—that the minor's estate had been benefitted by the alleged defalcations on the part of his guardian.

H. C. Coyaji, for the appellant.

N. V. Gokhale, for the respondent.

CHANDAVARKAR, J.:—The Lower Courts were wrong in burdening the plaintiff's share with the liabilities of the plaintiff's guardian, merely because that guardian committed defalcations in respect of the joint property of these parties. If the guardian committed defalcations the plaintiff cannot be held responsible for it; it being a tort committed by the guardian in his personal capacity, and not on behalf and for the benefit of the plaintiff. There is neither allegation nor proof that the plaintiff has derived such benefit.

We accordingly reverse the decree and direct the Lower Court (*viz.*, the Subordinate Judge) to effect a fair and equitable partition of all the joint property of the plaintiff and the defendants, which may be found to be in the possession of either of them or in the possession of the plaintiff's guardian Savitri kom Vishram.

Costs hitherto incurred to come out of the estate and the Subordinate Judge to provide for future costs.

Decree reversed.

1904.

SONU

v.

DHONDU.

APPELLATE CIVIL.

*Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Batty.*

1904.

January 18.

SAKHARAM KRISHNA AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS,
v. THE COLLECTOR OF RATNAGIRI FOR THE SECRETARY OF STATE
FOR INDIA (ORIGINAL DEFENDANT), RESPONDENT.*

Specific Relief Act (I of 1877), section 42—Suit for declaration of title—Omission to seek further relief—Revenue Jurisdiction Act (X of 1876), section 11—Suit against Government on account of any act or omission of any Revenue Officer—All such appeals allowed by the law—Appeals in respect of the act or omission—Title of suit.

The effect of the proviso to section 42 of the Specific Relief Act (I of 1877) is that the Court shall not make a declaration in the events specified in the proviso, not that the Court shall not grant the relief that is prayed.

The expression "all such appeals" in section 11 of the Revenue Jurisdiction Act (X of 1876), means appeals in respect of the act or omission. Therefore the bar of section 11 would not apply to a suit wherein the cause of action is not an order or decision in respect of which there was a right of appeal under the Land Revenue Code (Bom. Act V of 1879).

The Court directed the suit to be amended by substituting for the present description of the defendant, the title "The Secretary of State for India in Council."

APPEAL against the decision of H. Page, Acting District Judge of Ratnagiri, in Original Suit No. 14 of 1902.

The plaintiffs sued for a declaration that the village of Bail Budruk together with land, trees, water-courses, waters, grass, wood, stones, treasures trove, *Fad Farmas*, *vethbegar*, wells, *gaikuli* lands, rivers, streamlets and all their appurtenances, was of the plaintiff's *khoti vahivat*; that the defendant was not entitled to take *vasul* in excess of the survey assessment and that the plaintiffs had the right to take the *vasul* of the land whether

* Appeal No. 65 of 1903.

(1) Section 11 of the Revenue Jurisdiction Act (X of 1876):—

11. No Civil Court shall entertain any suit against Government on account of any act or omission of any Revenue officer unless the plaintiff first proves that previously to bringing his suit, he has presented all such appeals allowed by the law for the time being in force, as within the period of limitation allowed for bringing such suit, it was possible to present.

paying assessment or not, if cultivated. The plaintiffs further claimed to recover twenty rupees on account of damages and *vasul* of the land recovered by Government, namely, Rs. 4-15-3; for an injunction to the defendant's Officers that they should not let out for cultivation any lands either adjacent to the river or streamlet or any other lands; that they should not obstruct the plaintiffs in recovering *vasul* by *thal*, rent of all lands including rivers and rivulets, and that damages should be awarded to them with respect to the lands which the defendant might let out from the date of the plaint to the decision with costs of the suit.

The defendant contended that the suit was barred under section 42 of the Specific Relief Act (I of 1877) inasmuch as no cause of action had arisen to the plaintiffs and they had not claimed further relief with respect to the bed of the river which was in the possession of Government or their tenants; that the suit was not maintainable under section 11 of the Revenue Jurisdiction Act (X of 1876), the plaintiffs having failed to prefer appeals mentioned in that section; that the suit could not lie against the defendant (Collector) under section 6 of the said Act and section 416 of the Civil Procedure Code (Act XIV of 1882); that even supposing that the suit could lie in the form in which it was brought, still the plaintiffs had no right to obtain any relief inasmuch as they were not the owners of the river bed or of the village; that the suit was time-barred under article 120, schedule II of the Limitation Act (XV of 1877), the cause of action having arisen more than six years before the suit; that as the claim for damages was dependent on the plaintiffs' right of ownership and as the plaintiffs were not entitled to that right, the claim for damages could not lie and that Government was not responsible to the plaintiffs for the acts of their tenants.

On the above pleadings the following issues were framed :—

- (1) As to whether the suit was barred by section 42 of the Specific Relief Act?
- (2) As to whether the suit was barred by section 11 of the Bombay Revenue Jurisdiction Act?
- (3) Whether the plaintiffs were the proprietors of the river bed and of the village and whether they were in possession of the same?
- (4) Whether the suit as regards the declaration was barred under article 120 of the Indian Limitation Act?

1904.

SAKHARAM

v.
THE SECRETARY OF
STATE FOR
INDIA IN
COUNCIL.

1904.

SAKHARAM
v.
THE SECRETARY OF
STATE FOR
INDIA IN
COUNCIL.

(5) Whether the plaintiffs were entitled to any damages from defendant, and if so, what?

(6) Whether the suit as brought was maintainable under section 416 of the Civil Procedure Code, and section 6 of the Bombay Revenue Jurisdiction Act?

(7) What relief the plaintiffs were entitled to, if any?

The Judge found that (1) the suit was barred under section 42 of the Specific Relief Act, that (2) it was not barred by section 11 of the Bombay Revenue Jurisdiction Act, and that (6) it was barred by section 416 of the Civil Procedure Code and section 6 of the Bombay Revenue Jurisdiction Act, but the plaint might have been amended so as to comply with the provisions of those sections had this been the only objection. The Judge recorded no findings on the other issues and dismissed the suit. He observed :—

As regards the first issue the Government Pleader urges a point which appears to me to be of considerable importance. He contends that section 42, Specific Relief Act, lays down that no Court shall make a declaration of title when the plaintiff, being able to seek further relief than a mere declaration, omits to do so, and he points out that Government having given the river bed for cultivation for 3 years continuously must be held to be in possession thereof through their tenants. The Calcutta High Court has laid down (*vide* 8 Cal., 761 at page 765) that section 42 is to be applied with great caution, for otherwise it would seem that any one who claims any interest in property, present or future, would be allowed to ask the Court to give him an opinion on his title, which cannot have been the intention of the Legislature. Further, 8 Bombay, page 230, also shows that a Court should not allow a decision to the plaintiff which would enable him to evade the provisions of the stamp law. Mr. Damlé, who appears for the plaintiffs, is unable to refute the arguments put forward, and urges, on the authority of 15 Madras, page 15, that his clients may be allowed to amend the plaint. But I do not think, in view of their conduct, that they should be allowed to do so. It appears that they got an order from the District Deputy Collector on the 10th June, 1901 and that they gave the defendant notice of filing a suit on the 27th August in the same year. The suit was not actually filed, however, till 10th June, 1902. Some time after giving notice to the Collector it appears to have occurred to them that they had not exhausted all the remedies that lay in their hands. Consequently, on the 26th April, 1902, we find that they preferred an appeal to the Collector against the District Deputy Collector's decision. Then again some 21 days afterwards, *i. e.*, on 17th May, 1902, an application was made to the Revenue Commissioner. The appeal to the Collector should have been presented within 60 days, which would have allowed time for getting another decision in the case before the limitation period passed by, assuming, for the sake of argument, that that period was only one year from the date of the District Deputy Collector's order and of

appealing in proper form to the Commissioner. In view of their laches, in this connection, I do not think I should be right in showing them any leniency, more especially as the applications to the Collector and Commissioner still appear to be undisposed of.

The Government Pleader has taken one further objection to the suit, which is that the plaintiffs sue for a declaration as regards the whole village as well as with respect to the river beds, whereas there is no cause of action for the whole village. This procedure is manifestly objectionable. As laid down in 7 B. H. C. R., A. C. J., page 99, there must be some interference on the part of the defendant with respect to the subject matter in respect of which the suit is brought, and here there is clearly none but with respect to the river beds.

As regards the second issue, though the appeals to the Collector and Commissioner—if so be that the application to the latter officer can be designated an appeal—appear to have been presented one on the top of the other, and the first long beyond the limitation period of 60 days, still I do not think, in view of the ruling in 22 Bombay, page 583, I should have been justified in dismissing the claim on that ground. It is still discretionary with those officers to admit appeals made to them and to dispose of the question on its merits. But my finding on the first issue being in the affirmative, I dismiss the plaintiffs' suit, with costs.

The plaintiffs having preferred an appeal,

M. B. Charbal appeared for the appellants (plaintiffs):—We are khots and as such we have a right to the management of all the lands in the village. In 1890 Government let out certain lands and recovered assessment from the tenants. We contend that Government had no right to do so and we are entitled to recover damages. We also claimed an injunction. Our suit was thrown out under section 42 of the Specific Relief Act. This was an error. The defendant is in constructive possession through tenants and we also want to recover such constructive possession. Therefore the utmost that we could ask for in the suit was a declaration of right binding on the defendant coupled with an injunction preventing the defendant from interfering with such rights. We submit that in such a case an injunction is a consequential relief within the meaning of section 42 of the Specific Relief Act.

Rao Bahadur V. J. Kirtikar (Government Pleader) appeared for the respondent (defendant):—Under section 42 of the Specific Relief Act a suit for mere injunction cannot lie. Possession must be specifically claimed. A claim for mere injunction would involve a breach of the stamp duty and that cannot be allowed. In such cases the plaint cannot be amended. We rely on *Abdul*

1904.

SAKHARAM
v.
THE SECRETARY OF
STATE FOR
INDIA IN
COUNCIL.

1904.

SAKHARAM
v.
THE SECRETARY OF
STATE FOR
INDIA IN
COUNCIL.

Kadar v. Mahomed⁽¹⁾, *Narayana v. Shankunni*⁽²⁾, *Raj Narain Das v. Shama Nando Das*⁽³⁾.

The plaintiffs had not exhausted all their remedies under section 11 of the Revenue Jurisdiction Act. This is also a fatal objection to the maintenance of the suit.

JENKINS, C. J.:—The plaintiffs have brought this suit seeking a declaration that the village of Bail Budruk together with the land, trees, water-courses, &c., is of the plaintiffs' *khoti vahivat*, and that the defendant has no right of taking any *vasul* more than the survey assessment and that the plaintiffs have the right of taking by *thal* the *vasul* of all lands assessed and unassessed and *kharāba*, &c., if cultivated. The remaining prayers are for damages and injunction and mesne profits.

The suit has been dismissed on the ground that section 42 of the Specific Relief Act, in the circumstances of the case, requires that result.

Now section 42 enacts "that the Court (under the circumstances therein indicated) may in its discretion make a declaration provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so."

It is said that the plaintiffs were, in addition to the reliefs they have specifically sought, also entitled to claim possession and that therefore the suit must be dismissed. But obviously that is not so.

All that is provided is that the Court shall not make a declaration in the events specified in the proviso, not that the Court shall not grant the relief that is prayed.

In our opinion, therefore, the ground on which the suit was dismissed is wrong.

But it is said that there is another and fatal objection to the suit in that the provisions of section 11 of Act X of 1876 have not been observed. That objection has been overruled by the District Judge, but on a ground which does not commend itself to us. We think, however, that there is another and complete answer. The section provides "that no Civil Court shall enter-

(1) (1890) 15 Mad. 15.

(2) (1891) *Ibid.*, 255.

(3) (1899) 26 Cal. 845, 850.

tain any suit against Government on account of any act or omission of any Revenue-officer unless the plaintiff first proves that, previously to bringing his suit, he has presented all such appeals allowed by the law for the time being in force as, within the period of limitation allowed for bringing such suit, it was possible to present." That must mean appeals in respect of the act or omission.

Now was the act or omission which has given rise to the plaintiffs' right of suit one in respect of which an appeal was allowed? This must be determined by section 203 of the Land Revenue Code of 1879, which provides "that in the absence of any express provision of this Act, or of any law for the time being in force to the contrary, an appeal shall lie from any decision or order passed by a Revenue-officer under this Act, or any other law for the time being in force, to that officer's immediate superior, whether such decision or order may itself have been passed on appeal from a subordinate officer's decision or order or not." But that clearly does not apply in the circumstances of this case, because the act or omission which is the cause of action is not an order or decision in respect of which there was a right of appeal under the Land Revenue Code. Therefore this objection too must fail.

The case must accordingly go back to the District Court in order that it may be heard on the merits. It is necessary that an amendment of the suit should be made by substituting for the present description of the defendant, the title "The Secretary of State for India in Council."

The costs will be costs in the suit.

Case remanded.

1904.
SAKHARAM
v.
THE SECRETARY OF
STATE FOR
INDIA IN
COUNCIL.

APPELLATE CIVIL.

*Before Sir. L. H. Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Batty.*

1904.
January 20.

GHULAPPA BIN BALAPPA (ORIGINAL DEFENDANT I), APPLICANT, v.
RAGHAVENDRA SWAMIRAO (ORIGINAL PLAINTIFF), OPPONENT.*

Res judicata—Court competent to try suit.

The plea of *res judicata* should be given effect to if the Court which passed the decree in the first suit is a Court of jurisdiction competent to try the subsequent suit, whenever its inability to entertain the subsequent suit arises, not from incompetence, but from the existence of another Court with preferential jurisdiction.

APPLICATION under the extraordinary jurisdiction (section 25 of the Provincial Small Cause Courts' Act, IX of 1887) against the decision of R. R. Gangolli, First Class Subordinate Judge of Dhárwár, in Small Cause suit No. 9 of 1898.

Question of *res judicata*.

One Raghavendrarao Swamirao brought the following three suits against his debtor Ghulappa bin Balappa in the Court of the First Class Subordinate Judge of Dhárwár,

(1) Suit, No. 162 of 1897, to recover Rs. 658 including principal and interest under a money bond for Rs. 400, dated the 18th March, 1891. The suit was brought against Gulappa, the debtor, Balaji, Narayan and Raghavendra, three sons of the deceased surety Udpirao Lakshman and one Yamappa bin Lakshmappa. This suit was within the cognizance of the Subordinate Judge in his ordinary jurisdiction.

(2) Suit, No. 380 of 1897, to recover Rs. 361 including principal and interest under a money bond for Rs. 200, dated the 4th February, 1892. This suit was within the cognizance of the Subordinate Judge in his Small Cause jurisdiction.

(3) Suit, No. 9 of 1898, to recover Rs. 207 including principal and interest under a money bond for Rs. 125, dated the 4th July, 1894. The suit was brought against the debtor Ghulappa and the abovementioned three sons of his deceased surety Udpirao.

* Application No. 309 of 1902 under the Extraordinary Jurisdiction.

1904.

GHULAPPA
BIN BALAPPA
v.
RAGHAVEN-
DRA.

This suit also was within the cognizance of the Subordinate Judge in his Small Cause jurisdiction.

At the trial of the said suits, the parties agreed to abide by the decision of the Court in suit No. 162 of 1897, which was cognizable in the ordinary jurisdiction.

The defendant Ghulappa bin Balappa relied on a receipt, Exhibit 85, passed to him by the plaintiff and pleaded satisfaction of the several debts. The Subordinate Judge found that Exhibit 85 was forged and allowed the claim in suit No. 162 of 1897 as well as in the other two suits which were cognizable in the Small Cause jurisdiction. Against the decree in suit No. 162 of 1897, the defendant Ghulappa preferred an appeal, No. 281 of 1898, to the District Court at Dhárwár, which reversed the decree and dismissed the suit holding that Exhibit 85 was a genuine document. The decree of the District Court was confirmed by the High Court in second appeal No. 179 of 1900. On the strength of the decree in the second appeal, the defendant Ghulappa applied for review of the decisions in suits No. 380 of 1897 and No. 9 of 1898. The Subordinate Judge admitted the review petitions and after hearing arguments on both sides held on the authority of the rulings in *Abdul Majid v. Jew Narain Makto* ⁽¹⁾, *Sheoraj Rai v. Kashi Nath* ⁽²⁾, *Ghela Ichkaram v. Sankalchand* ⁽³⁾, *Sheo Ratan Singh v. Sheosahai Mir* ⁽⁴⁾, that the decision of the District Court in appeal No. 281 of 1898 did not operate as *res judicata* and directed the defendant to pay to the plaintiff the amounts claimed with all costs.

The defendant, thereupon, applied under the extraordinary jurisdiction (section 25 of the Provincial Small Cause Courts' Act IX of 1887) urging *inter alia* that the Subordinate Judge erred in holding that the decision of the District Court in the appeal and that of the High Court in the second appeal did not operate as *res judicata* and that he erred in not taking into consideration the fact that the parties had agreed to abide by the decision in suit No. 162 of 1897. A *rule nisi* having been issued calling on the defendants to show cause why the plea of *res judicata* should not apply,

(1) (1888) 16 Cal. 233.

(2) (1884) 7 All. 247.

(3) (1893) 18 Bom. 597.

(4) (1884) 6 All. 358.

1904.

GHULAPPA
BIN
BALAPPA
v.
RAGHAVEN-
DRA.

M. B. Charbal appeared for the applicant (defendant 1) in support of the rule.

S. R. Bakhle appeared for the opponent 1 (plaintiff) to show cause.

H. C. Coyaji appeared for the opponents 2 and 4 (defendants 2 and 4) and supported the rule.

JENKINS, C. J. :—In our opinion effect should have been given to the plea of *res judicata* on the rehearing of the suit, for the Court which passed the decree in suit No. 162 of 1897 was a Court of jurisdiction competent to try this suit. Its inability to entertain it arose not from incompetence, but from the existence of another Court with a preferential jurisdiction. The rule must therefore be made absolute and the suit dismissed. The plaintiff must pay the costs of suit and rule but only one set.

Rule made absolute.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

ACHRATLAL HARILAL (ORIGINAL PLAINTIFF), APPELLANT, v. THE AHMEDABAD MUNICIPALITY (ORIGINAL DEFENDANT), OPPONENT.*

The District Municipal Act (Bom. Act III of 1901)—Non-feasance—Negligence in performance of duty towards plaintiff—Suit for damages.

The plaintiff, an inhabitant of Ahmedabad, having brought a suit against the Ahmedabad Municipality to recover damages sustained by him in respect of an injury caused to his horse and carriage in consequence of the neglect of the Municipality to repair a road,

Held that as the default leading to the damage was a mere non-feasance, the suit must fail, for the statute does not impose upon the Municipality a duty towards the plaintiff which they negligently failed to perform.

APPLICATION under the extraordinary jurisdiction (section 25 of the Provincial Small Cause Courts' Act IX of 1887) against the decision of L. P. Parekh, Judge of the Court of Small Causes at Ahmedabad, in suit No. 725 of 1903.

* Application No. 210 of 1903 under the Extraordinary Jurisdiction.

1904.

January 20.

Suit against a Municipality to recover damages for non-feasance.

1904.

ACHRATLAL
v.
THE AHMEDA-
BAD MUNICI-
PALITY.

The plaintiff sued the Municipality of Ahmedabad in the Court of Small Causes at Ahmedabad to recover rupees seventy-five as damages sustained by him in respect of the injury caused to his horse and carriage in consequence of the defendant's neglect to repair a certain road.

The defendant denied the claim and contended that it was not admissible.

The Judge dismissed the suit on the following grounds:—

The plaintiff has based his claim on a non-feasance but not on a mis-feasance. He says that because the road referred to in the plaint was not repaired, his horse stumbled on the 24th November, 1902, and broke his leg. He therefore claims Rs. 75 as damages. * * * * *

There is no law which would make the Municipality liable for mere non-feasance. The Municipal Acts of 1873 and 1884 did not contain any provision holding the Municipality liable for mere non-repairs. There is also nothing in the new Act (III of 1901), which would make such a body responsible; *vide* Sander's Law of Negligence, p. 131; *Atkinson v. New Castle Waterworks Co.* No action for non-user of statutory powers can lie, *id.* 130-132; *vide* also Ratanlal's Law of Torts, p. 25; 22 L. T. Reports 295, 887; Mew's Digest of English Case Law, Vol. X, p. 94, and other cases cited on behalf of the Municipality. I. L. R. 17 Bom. 307 relied on by the plaintiff is on negligence only. It is true that section 54 requires the Municipality to set apart a reasonable sum for road repairs and that all roads vest in the Municipality. But those circumstances alone are not sufficient to make the Municipality responsible for non-repairs. It might be that the funds at the disposal of the Municipality were not sufficient to repair all roads.

The plaintiff applied under the extraordinary jurisdiction (section 25 of the Provincial Small Cause Courts' Act IX of 1887) urging *inter alia* that the defendant being under a statutory obligation to maintain and repair all public roads, was liable for a breach of this statutory duty and that the Judge ought to have awarded the damages claimed. A *rule nisi* having been issued requiring the defendant to show cause why the decree of the Judge should not be set aside,

G. S. Rao appeared for the applicant (plaintiff) in support of the rule:—We sued the Municipality to recover damages for neglecting to repair a public road. The road vested in the

1904.

ACHRATLAL
v.
THE AHMEDA-
BAD MUNICI-
PALITY.

Municipality under the District Municipal Act (Bom. Act III of 1901) and it was incumbent upon it to keep it in a proper state of repairs. The Judge dismissed our suit holding that it was based on non-feasance and not on mis-feasance and, therefore, the Municipality was not liable. He relied on *Lascelles v. Lord Onslow* ⁽¹⁾. That case is distinguishable. The statute which governed that case provided a special penalty, but the District Municipal Act does not provide such a penalty. Section 54 of the Act governs the present case. Section 50 shows what property vests in the Municipality. Taking the two sections together, all public streets become vested in the Municipality. The Municipality having thus become the owner of the road, it is liable at the instance of any member of the public like an ordinary private individual: *The Queen v. Inhabitants of Dukinfield* ⁽²⁾. The Judge found that the road was never repaired by the Municipality and yet he held that the non-repair would not make the Municipality liable. He further found that the accident was due to the negligence on the part of the Municipality, but he held that this was non-feasance which would not saddle the Municipality with liability. We submit that this is an erroneous view: *The Borough of Bathurst v. Macpherson* ⁽³⁾. No distinction can be drawn between non-feasance and mis-feasance: *White v. Hindley Local Board of Health* ⁽⁴⁾, *Henley v. The Mayor and Burjesses of Lyme* ⁽⁵⁾, *The Corporation of the Town of Calcutta v. Anderson* ⁽⁶⁾, *M'Kinnon v. Penson* ⁽⁷⁾.

L. A. Shah appeared for the opponent (defendant) to show cause:—First we contend that there is no section in the District Municipal Act which compels the Municipality to keep every possible road in the town in repairs. Secondly, in a case like the present no private action can lie. Section 178 of the District Municipal Act (Bom. Act III of 1901) provides a remedy. Section 54 imposes no absolute duty and refers to the application of Municipal funds. If any loss be caused by the non-repair of the road, the corporate body cannot be held liable in damages:

(1) (1877) 2 Q. B. D. 433, 441.

(2) (1863) 4 B. & S. 158, 161.

(3) (1879) 4 App. Cas. 256.

(4) (1875) L. R. 10 Q. B. 219.

(5) (1828) 5 Bing. 91.

(6) (1894) 10 Cal. 445 at p. 462.

(7) (1853) 8 Exch. 319.

Cowley v. The Newmarket Local Board ⁽¹⁾, *Municipality of Pictou v. Geldert* ⁽²⁾, *Thompson v. Mayor, &c., of Brighton* ⁽³⁾, *Municipal Council of Sydney v. Bourke* ⁽⁴⁾. The Municipality stands in the shoes of Government and the test is whether Government would have been liable to plaintiff's claim. We submit not: *Sanitary Commissioners of Gibraltar v. Orfila* ⁽⁵⁾. All public roads are vested in Government under section 37 of the Land Revenue Code (Bom. Act V of 1879) and we find no case in which Government has been successfully sued for non-repair of roads within Municipal areas, nor any law under which Government can be held liable. The District Municipal Act imposes no such liability upon the Municipality as the plaintiff wants it to bear.

In the cases relied on for the applicant there was mis-feasance or non-feasance arising out of mis-feasance. They are, therefore, not applicable.

G. S. Rao, in reply :—Section 178 relates to prospective arrangement. It does not affect the right of private individuals to sue the Municipality in damages arising on account of its negligence. The Municipality does not stand in the shoes of Government. It is not invested with powers which are vested in Government. Its powers come into existence simultaneously with its creation. There was no transfer of the powers from Government to the Municipality.

JENKINS, C. J.:—As the default leading to the damage was a mere non-feasance, the plaintiff's suit fails, for the statute does not impose upon the Municipality a duty towards the plaintiff, which they negligently failed to perform. Therefore the rule must be discharged with costs.

Rule discharged.

(1) (1892) A. C. 345.

(3) (1894) 1 Q. B. 332.

(2) (1893) A. C. 524.

(4) (1895) A. C. 433.

(5) (1890) 15 App. Cas. 400 at p. 411.

APPELLATE CIVIL.

1904.
January 21.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.
Ex parte MAHADEV GANGADHAR DESHPANDE (ORIGINAL APPLICANT),
APPELLANT.*

Succession Certificate Act (VII of 1889), section 6, clause (d)—Guardian and Wards' Act (VIII of 1890), section 27—Minor—Guardian—Succession Certificate.

A certificate under the Succession Certificate Act (VII of 1889) can be granted to the guardian of a minor.

Gulabchand Gamnaji v. Moti Chatraji⁽¹⁾, distinguished.

APPEAL against the decision of L. Crump, District Judge of Sátara, in the matter of an application under the Succession Certificate Act (VII of 1889).

One Mahadev Gangadhar Deshpande having been appointed guardian, under the Guardian and Wards' Act (VIII of 1890), of the person and property of his minor daughter Yamunabai, widow of Narhar Anant Renavikar, applied for a certificate under the Succession Certificate Act (VII of 1889) to collect the debts due to the minor on her behalf. The Judge dismissed the application holding that it was not maintainable under the ruling in *Gulabchand Gamnaji v. Moti Chatraji*.⁽¹⁾

The applicant having appealed,

K. H. Kelkar appeared for the appellant (applicant); he relied on *Ram Kuar v. Sardar Singh*.⁽²⁾

JENKINS, C. J.:—This is an application for the grant of a succession certificate under Act VII of 1889 and the petitioner purports to be a minor widow acting through her father and guardian, Mahadev Gangadhar Deshpande.

An order has been made purporting to appoint the father a guardian of the person and property of his minor daughter under Act VIII of 1890 (Guardian and Wards' Act). The present application should, we think, be amended so as to make the guardian the petitioner, because it is at least open to doubt

*Appeal No. 154 of 1903.

(1) (1900) 25 Bom. 523.

(2) (1898) 20 All. 352.

reading the Succession Certificate Act as a whole whether a grant should be made to a minor.

Treating the amendment then as made, and the petition as one presented by a legal guardian of the minor, can we grant a certificate under the Succession Certificate Act?

The District Judge has decided this in the negative, relying on *Gulabchand Gamnaji v. Moti Chatraji*.⁽¹⁾

The head-note in that case goes beyond the actual decision, for the Court was not in the circumstances called on to determine, nor did it in fact determine, that a legal guardian is not entitled to a succession certificate under the Succession Certificate Act.

No doubt clause (d) of section 6 requires that the application should set forth the right under which the petitioner claims, and on that the comment was made in Gulabchand's case that it only permits the petitioner who claims the right for himself, to apply. But a legal guardian has, under section 27 of the Guardian and Wards' Act, the obligation cast upon him of dealing with the property of a ward as carefully as a man of ordinary prudence would deal with his own, and subject to the provisions mentioned in chapter 3 of the Act, he may do all acts which are reasonable and proper for the realization, protection or benefit of the property. That appears to us to vest in the guardian power to receive from any debtor the sum due by him to his ward and to give a receipt for the same. This constitutes the right under which he claims within the meaning of clause (d) of section 6 of the Act.

Therefore on the completion of the amendment we have directed, an order will be drawn up for a grant to the guardian of a succession certificate on proper security being furnished to the satisfaction of the District Court. For the reasons we have given we must reverse the decree of the District Judge who only came to the conclusion he did, because he reasonably treated himself as bound by authority.

Decree reversed.

⁽¹⁾ (1900) 25 Bom. 523.

1901.

(EX PARTE)
MAHADEV
GANGADHAR.

APPELLATE CRIMINAL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

EMPEROR v. MAGANLAL DULABHAI.*

1904.

January 28.*Bombay Salt Act (Bombay Act II of 1890), section 47†—Salt—Removal of Salt—Intention—Knowledge—Ingredients of the offence.*

To support a conviction under section 47 (a) of the Bombay Salt Act (Bombay Act II of 1890) it is not necessary to prove dishonest intention on the part of the accused; since the wording of the clause does not in express terms or by necessary implication make intention or knowledge an essential ingredient of the offence. What is prohibited by the Act is the removal of salt in contravention of any license or permit and that shows that such removal is prohibited in itself.

APPEAL by the Government of Bombay under section 417 of the Code of Criminal Procedure (Act V of 1898), from an order of acquittal passed by J. Sladen, District Magistrate of Surat.

The accused, a boy, obtained in the usual way on his application a permit for one maund of salt in each of the two bags brought by him. He presented the permit, but his bags were filled with two maunds each. The permit, which is usually signed after the weight and the bags are verified, was signed by both the weighing clerk and the writing clerk at the scales. The accused then removed the bags containing salt, and it was discovered at the Preventive Náka to be in excess of the permit.

On these facts, the accused was charged with an offence punishable under section 47 (a) of the Bombay Salt Act (Bombay Salt Act II of 1890). The Second Class Magistrate of Bulsár

* Criminal Appcal No. 461 of 1903.

† Section 47 of the Bombay Salt Act (Bombay Act II of 1890) runs as follows :—

47. Whoever in contravention of this Act, or of any rule or order made under this Act, or of any license or permit obtained under this Act—

- (a) manufactures, removes or transports, salt ; or
 - (b) excavates, collects or removes natural salt, or salt-earth ;
- and whoever

(c) except in the exercise of some power or the discharge of some duty conferred or imposed upon him under this Act or any other enactment at the time in force receives or is in possession of, or, without lawful excuse, retains contraband salt knowing or having reason to believe the same to be contraband salt ; shall, for every such offence, be punished with fine which may extend to five hundred rupees, or with imprisonment for a term which may extend to six months, or with both.

convicted the accused of the offence and sentenced him to pay a fine of Rs. 25.

The accused appealed to the District Magistrate of Surat, who reversed the conviction and sentence and acquitted the accused.

The following were his grounds:—

“The Lower Court has convicted on the assumption that so large an excess could not be removed without the appellant's knowledge that he was taking more than the permit allowed. In the face of the evidence this assumption cannot be admitted. There is not a syllable which imputes any guilty knowledge on the part of the appellant. Nor is it safe to assume that every one can tell the difference between one maund and two maunds...There is not in my opinion any ground for assuming that the appellant either obtained double the quantity entered on his permit by collusion with the karkuns, or having obtained it by their carelessness was aware of the fact and tried to remove it.

The Government Prosecutor referred particularly to sections 32 and 35 of the Salt Act. The former requires the subordinate Salt officer ‘to endorse upon the order a certificate signed by himself and by the person who removes the salt, as to the correctness of the weighment’ and the latter makes it ‘incumbent on every person who has obtained a permit for the removal of salt; (b) to prevent the removal of salt in excess of the quantity mentioned in the permit.’ But I cannot hold that he becomes criminally liable if no dishonest intention can be proved.”

The Government of Bombay appealed to the High Court.

The Government Pleader for the Crown.—Under section 47 (a) of the Bombay Salt Act (II of 1890), knowledge is not an essential ingredient of the offence. This becomes apparent when clause (a) is contrasted with clause (c) of the section. Further section 35 of the Act shows that knowledge is not an essential ingredient in the offence under section 45 (a), since the former section imposes upon the permit-holders the duty of testing the scales and weights. The true test is to look at the object of the Act to see how far knowledge is made the essence of the offence, and in this connection three rules of construction must be considered. They are (1) whether the object of the Act will be frustrated, if proof of such knowledge is rendered necessary, (2) whether there is anything in the wording of the section which implies knowledge, and (3) whether this is made clear by comparison of the section with the other cognate sections of the Act. Judged by all these tests, knowledge does not appear to be a necessary element of the offence.

1904.

EMPEROR
v.
MAGANTAL
DULABHAI.

1904.

EMPEROR
v.
MAGANLAL
DULABHAI.

N. K. Desai for the accused.—The accused is not liable for he cannot be said to have removed salt in contravention of his permit, and if knowledge is not considered an essential in the offence of section 47 (a) of the Bombay Salt Act (Bombay Act II of 1890), it would go very hard with innocent and uncultured purchasers, who would be held criminally liable for the honest mistakes, if any, of the clerks of the Salt Department.

PER CURIAM.—The District Magistrate reversed the conviction under section 47, clause (a), of the Bombay Salt Act on the ground that no dishonest intention on the part of the accused was proved. But the provisions of the section do not in express terms or by necessary implication make intention or knowledge an essential ingredient of the offence. Where the Legislature intended intention or knowledge to be the gist of any offence under the Act it has used apt language to convey its meaning. See clause (c) of section 47 whereby the retention of contraband salt by any person “knowing or having reason to believe the same to be contraband salt” is made an offence under the Act. But it was urged before us by the accused’s pleader that the Legislature omitted to use the words “knowingly or intentionally” in clause (a) of section 47 because it was said the mere act of removal by a person in contravention of his license or permit is sufficient to imply that the removal should be deliberate. We do not think so. In the words of Lord Alverstone, C. J., in *Emery v. Nolloth*⁽¹⁾ “if the offence is prohibited in itself, knowledge on the part of the licensee is immaterial; this principle was acted upon quite recently in *Brooks v. Mason*⁽²⁾ where intoxicating liquor had been sold in a bottle not in fact sufficiently corked but believed to be so, and knowledge was held to be immaterial. Similarly, where there is an absolute prohibition against selling, it is unnecessary to prove knowledge.” What is prohibited by the Salt Act is the removal of salt in contravention of any license or permit and that shows that such removal is prohibited in itself. We must, therefore, set aside the order of acquittal and restore the order of conviction and sentence passed by the Second Class Magistrate against the accused under section 47 (a) of the Bombay Salt Act.

(1) (1903) 2 K. B. 264 at p. 269.

(2) (1902) 2 K. B. 713.

APPELLATE CIVIL.

FULL BENCH.

*Before Mr. Justice Chundavarkar, Mr. Justice Batty, and
Mr. Justice Aston.*

HARI BIN BHIWA (ORIGINAL PLAINTIFF NO. 1), APPELLANT, v. VISHNU
DINKAR AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

1904.
February 4.

*Mortgage—Mortgage-debt—Another debt on a previous kháta made payable
under the deed—Olog on Equity of Redemption—Charge.*

The property in suit was mortgaged for Rs. 1,500. The mortgage-deed further recited an earlier debt of Rs. 5,000 due on a previous kháta and provided that if the mortgagor did not repay this Rs. 5,000 within two years from the date of the deed, he was not at liberty to redeem the property, unless both the debts of Rs. 1,500 and Rs. 5,000 were paid. The deed was stamped as a mortgage for Rs. 6,500.

On a construction of the deed :

Held, that the property mentioned in the deed was mortgaged for the sum of Rs. 5,000 and interest payable thereunder and also for Rs. 1,500, with this difference that the mortgage as to the former sum took effect on the expiry of two years after the date of the deed.

SECOND appeal from the decision of G. C. Whitworth, District Judge of Sátára, confirming the decree passed by N. V. Samant, Subordinate Judge of Rahimatpur.

The property in suit originally belonged to one Vishnudas Gujar. He mortgaged it in 1863 to Dinkar Apaji Damle (father of defendants 1 and 2) for Rs. 1,500. The deed recited an earlier debt of Rs. 5,000 due on a previous kháta, and provided that if the debt of Rs. 5,000 were not paid by the mortgagor within two years from its date, he was not at liberty to redeem the property unless both the debts, *viz.*, Rs. 1,500 and Rs. 5,000, were paid. The mortgage-deed (Exhibit 23) was stamped as one for Rs. 6,500; and was in the terms set out in the judgment of Batty, J.

Vishnudas had three sons : Krishnadas, Narayandas and Damodardas. Of them Narayandas and Damodardas died without any issue. Krishnadas had a wife, Subhadra, by whom he had one son, Bhikhudas. This Bhikhudas sold the equity of

1904.

HARI
v.
VISHNU.

redemption in the property to the plaintiff 1 on the 30th July, 1895, for Rs. 500. In 1898, the plaintiff 1 brought a suit against the defendants to redeem the property on a payment of Rs. 1,500. While these proceedings were pending in Court, the plaintiff 1 sold on the 16th January, 1900, for Rs. 500, the *inâmi* rights in the property to Gokaldas Ramdas, who was subsequently added as plaintiff 2.

The defendants contended (*inter alia*) that the deed of sale dated the 30th July, 1895, on which the plaintiff relied was colourable, that the mortgage was for Rs. 6,500 and not for Rs. 1,500, and that they had been in possession of the property in consideration of the loan of Rs. 6,500.

The Subordinate Judge held that the deed of sale on which the plaintiffs relied was colourable, and that if the plaintiffs were to be allowed to redeem they would have to pay Rs. 1,680 besides the damdupat of the loan of Rs. 5,000.

On appeal this decree was confirmed by the District Judge.

Plaintiff 1 appealed to the High Court contending among other things that the Lower Courts erred in holding that the sum of Rs. 5,000 was a charge on the land in question and should be paid before it could be redeemed.

The appeal came on for hearing before Batty and Aston, JJ., when their Lordships recorded the following judgments in making a reference to the Full Bench.

BATTY, J.:—In this case the plaintiff sues as assignee of the equity of redemption to redeem certain property mortgaged in 1863 to the father of the defendant. The assignment was held colourable by the Courts below. The suit was dismissed partly on this ground (which we hold to be immaterial), and partly on the ground that the mortgage purported to make the payment of a debt prior to the mortgage transaction a condition precedent to the right to redeem and that the plaintiff not having proved discharge of that prior debt was not entitled to redeem. The Court of first instance held on a construction of the mortgage-deed that the prior debt was not made a charge upon the property mortgaged, but that its payment was a condition precedent and the Lower Appellate Court held that there was

nothing in the ruling in *Hari v. Balambhat*⁽¹⁾ which would allow this provision to be disregarded and redemption without payment of that prior debt. Before us it has been argued that the condition requiring payment of another debt not itself charged upon the property was a clog on the equity of redemption and as such must be disregarded. The mortgage in question runs as follows :—

1904.

HARI

v.

VISHNU.

“Debt bond. The 2nd of Shravan Shudh in Shake 1785, in the cyclical year named Rudhirodgari, the day of the week Sunday (16th August, 1563). Given in writing to the creditor by name Rajeshri Dinkarpant Apa Damle residing at Kasba Rahimatpur, taluka aforesaid. The Fasli year 1273. For a reason I give this debt bond in writing as follows :—I have borrowed from you for my own purposes money as follows :—

The particulars in respect thereof are—

5000. Money was due to you in respect of a previous (?) Mirajkhata. The document in respect thereof bore the Lunar date the 1st of Kartik Shudh of Shake 1776. In respect of the same the sum of rupees five thousand of Surat currency is this day fixed to be payable.

1500. There is due to Rajeshri Vishnu Bapuji Bhide of Sátara money borrowed by me on the security of a *kotha* (P granary) situate at Sátara and a house and Inám Mala (plantation), &c., situate at Kasba Rahimatpur. For the purpose, among other things, of making payment to Bhide by redeeming out of the said property, the Inám Mala and the house situate at Kasba aforesaid from Bhide and (thus) for mortgaging (the same) to you I have this day taken in cash rupees fifteen hundred of Surat currency.

6500

Thus the principal sum of rupees six thousand and five hundred is this day due to you. The terms in respect of making payment of the same together with interest are as follows :—

I. As to the sum of rupees 5,000 of Surat currency which is now fixed to be payable in respect of the previous debt, I will pay off the same within two years from this day. The security for the said money (is) : There is due to me from Shrimat Rajeshri Raghunathrao Jaivant Mantri Islampurkar money (P lent) in the presence of the deceased Govind Mahadeo Sane Limbkar, a denizen of paradise, by his son and heir Nilkant Govind Sane Limbkar, and through the deceased Rajeshri Narayanrao Vithal Mahajani, a denizen of paradise, by his brother and heir Vamanrao Vithal Mahajani of Sátara. The matter is now pending before the British Government. When the said money is received, out of that money I will pay off the aforesaid money together with interest at the rate of Re. $\frac{1}{2}$ (namely eight annas) per centum per mensem, that is to say, the whole amount,

(1) (1884) 9 Bom. 233.

1904.

HARI
v.
VISHNU.

whatever the same may come to under the account. Should no money be received from Mantri, I will pay up the principal sum by trying my best at any time you may demand payment in respect thereof without pleading any excuse on his (Mantri's) account.

I. As to rupees (1,500) fifteen hundred taken this day in cash for making payment to Bhide and for other purposes, as mortgage security for the same I give my private inám lands and house situate at Kasba Rahimatpur, taluka Koregaon. The particulars thereof (are) as follows :—

I. Inám lands, plots two Bagait and Jirait. (Here follows description of property which is not translated.)

For the above sum of rupees fifteen hundred borrowed (from you) I mortgage (to you) the Inám lands and house as described above and this day I give the same into your possession for vahivat. You may therefore yourself carry on vahivat of the said lands and house as owner thereof or you may cause vahivat to be carried on by any other person and in any manner you like. You yourself are to take the income which may be realised from the lands every year and the fruits, &c., which the trees may yield and the rent of the house as the fixed interest on the said fifteen hundred rupees. The sum of fifteen hundred rupees borrowed from you is to bear no interest. I am to repay the said rupees fifteen hundred without interest in five years from this day. As to the Chauthai (dues) and Nazarána (presents) amounting in all to (Rs. 14-11-0) fourteen rupees and eleven annas which are every year payable to Government for the Inám lands, you are to pay the same and take a receipt in respect thereof. Should any embankments have to be erected in the said lands and should there be any breakage and falling off of the wells and should there be any breakages and dilapidations in respect of the house, I will cause repairs to be made to the same at the proper time. Should I fail to cause the said repairs to be made in time and should you happen to make the same, you are to make the outlays that may be required to be made and debit the same in my name. At the time of paying off the mortgage money I will make payment of the whole amount together with interest at Re. $\frac{1}{2}$ (namely eight annas) per centum per mensem on the total sum of expenses, &c. Should you happen to plant new trees and preserve them hereafter in the said lands, half of the new trees which may be in existence at the time of the redemption of the mortgage are to belong to you and the (other) half are to belong to me. As the said Inám lands are mortgaged to you and given to you for vahivat, I give to you as muniment of title the sanad given to me by the Sarkár for enjoyment thereof. My kinsmen and others have no claim to the lands and house given in mortgage.

I will pay off both the sums in pursuance of the stipulations contained in the above two paras. Stipulations have been made above in respect of the payment of the previous sum. Unless and until the said sum is paid off in pursuance of the said stipulations I will not (try to) redeem the property mortgaged, by the mere payment of rupees fifteen hundred borrowed on the security of the property mortgaged. Should I have to redeem the mortgage, I will not lay any claims to the property mortgaged, unless I pay off both the sums wholly.

I have duly given this deed in writing at Rahimatpur of my own accord. Dated the 16th of August in the Christian year 1863. The handwriting of Damodar-das Vishnudas Gujaráti of Sátára, residing at Rahimatpur."

1904.

HARI
v.
VISHNU.

The pleader for the appellants refers us to the case of *Noakes & Co. Limited v. Rice*⁽¹⁾ and to the remarks thereon in the recent judgment in *Rajamal Motiram v. Shivaji Anand Rao*⁽²⁾ in which the ruling in *Hari v. Balambhat*⁽³⁾ is not accepted as sufficient authority for the view taken in this case by the Courts below.

For the respondent it is sought to support the decisions of the Courts below on the authority of the following cases: *Hari v. Balambhat*⁽³⁾; *Yashvant Shenvi v. Vithoba Sheti*⁽⁴⁾; *Sunder Malhar Patel v. Bapuji Shridhar*⁽⁵⁾; *Krishnaji v. Maheshwar*⁽⁶⁾.

In the cases cited for respondent the Court upheld agreements purporting to make the right to redeem dependent on prior payment of a debt that was not itself made a charge, notwithstanding the decisions in *Rama v. Martand*⁽⁷⁾ and *Narayan v. Raoji*.⁽⁸⁾

In the present case the terms of the document appear to bring the case within the principles accepted in *Rama v. Martand*⁽⁷⁾, *Narayan v. Raoji*⁽⁸⁾ and *Rajamal Motiram v. Shivaji Anand Rao*⁽²⁾. But in view of the decisions abovementioned as cited for the respondent, we think desirable a reference to a Full Bench of the question whether a condition in a mortgage deed is not invalid as a clog on the equity of redemption, if it purports to make the payment of a sum not specifically made a charge upon the property mortgaged, a condition precedent to the right to redeem.

ASTON, J.:—In *Hari v. Balambhat*⁽³⁾ and *Yashvant v. Vithoba*⁽⁴⁾ a stipulation to postpone redemption till payment of another debt set out, was interpreted as constituting not a charge on the property but a condition precedent to redemption.

In *Krishnaji v. Maheshwar*⁽⁶⁾ Sargent, C. J., said: "having regard to the decision in *Yashvant Shenvi v. Vithoba Sheti*⁽⁴⁾

(1) (1902) A. C. 24.

(2) (1902) 4 Bom. L. R. 963.

(3) (1884) 9 Bom. 233.

(4) (1887) 12 Bom. 231.

(5) (1893) 18 Bom. 755.

(6) (1895) 20 Bom. 346.

(7) (1884) 9 Bom. 236 f. n.

(8) (1884) P. J. p. 254.

1904.

HARI
v.
VISHNU.

affirming the validity of an agreement embodied in a mortgage-deed to postpone redemption of the mortgage until payment of another debt which had not been made a charge upon the land, we are unable to hold that a similar agreement contained in a subsequent deed executed for a fresh consideration is invalid."

In *Sunder v. Bapuji*⁽¹⁾ a mortgage bond contained a clause stipulating that the mortgagors were not to redeem the mortgaged property without paying not merely the amount of the mortgage debt and interest but also the amount due on a certain instalment bond executed at the same time as the mortgage in respect of money due under a decree and that "unless the whole was paid off neither the mortgagor nor any one else should have a claim."

It was contended that upon the proper construction of this instrument it must be taken that it was the intention of the parties to make the amount due upon the instalment bond a charge on the lands mortgaged. Dealing with this construction Sargent, C. J., said:—"We do not think it necessary to express a decided opinion on this contention of the defendant, as we think that in any case the right of redemption was made conditional on whatever was due at the time on the instalment bond being paid."

Mr. Coyaji for the appellant, original plaintiff No. 1, contends that where a debtor owing an unsecured debt obtains from his creditor a further loan under an instrument which mortgages property as security for the fresh loan and also provides in the terms used in Exhibit 23 that the previously unsecured loan is to be paid before redemption as to the fresh loan, the latter provision is not a part of the mortgage transaction and does not make the property security for both the prior and the subsequent debt. On this assumption he bases the further contention that such a condition precedent to redemption is a clog or fetter on the equity of redemption of what is only a mortgage for the subsequent loan and as such cannot be enforced. He relied upon the judgment pronounced by Melvill, J., in *Rama v. Martand*⁽²⁾ and upon *Rajamal v. Shivaji*⁽³⁾.

Mr. Bakhle for the mortgagees contends that the instrument Exhibit 23 properly construed shows that the parties intended

(1) (1893) 13 Bom. 755 at p. 757.

(2) (1884) 9 Bom. 236 f. n.

(3) (1902) 4 Bom. L. R. 966.

1904.

HARI
v.
VISHNU.

to make the (mortgaged) property security for both the prior and the subsequent debts, and the stipulation referred to was therefore part of the mortgage transaction which entitles the mortgagees to possession of the property as security for the prior debt, so there is no need to treat the whole of the transaction of mortgage as confined to the agreement about the subsequent debt (Rs. 1,500) by which method alone the stipulation can be treated as a clog or fetter on redemption. Mr. Bakhle in effect contends that the decision in *Rama v. Martand*⁽¹⁾ and *Rajmal v. Shivaji*⁽²⁾ do not avail the appellant unless the decision in *Hari v. Balam-bhat*⁽³⁾ and *Yashvant v. Vithoba*⁽⁴⁾ are treated as binding this Court to the view that such a stipulation does not create a charge; and he argues that the stipulation in question in Exhibit 23 is in itself a transfer of an interest to secure payment of money and does create a charge and being part of the mortgage transaction, is enforceable as such.

He relies upon the definitions of "mortgage" and "charge not amounting to a mortgage" in sections 58 and 100 of the Transfer of Property Act (IV of 1882).

The following remark of Lord Davey in *Noakes & Co., Limited, v. Rice*⁽⁵⁾ was cited: "The principle is this—that a mortgage must not be converted into something else, and when once you come to the conclusion that a stipulation for the benefit of the mortgagee is part of the mortgage transaction, it is but part of his security, and necessarily comes to an end on the payment off of the loan." See also the observation of Jessel, M. R., in *Ex parte Sheil*⁽⁶⁾.... "Another instance familiar to real property lawyers was where the debt had been extinguished at law by the taking of the debtor's body in execution. Still the mortgagor could not get back the estate without payment of the money secured by the mortgage deed. The right of the mortgagee to keep the estate did not depend upon his right to recover the debt in the action, but the two rights were wholly independent the one of the other. His right was, not to recover the money, but to keep the estate till the money was paid, which is a totally different thing." I

(1) (1884) 9 Bom. 236 f. n.

(2) (1902) 4 Bom. L. R. 966.

(3) (1884) 9 Bom. 233.

(4) (1887) 12 Bom. 231.

(5) (1902) A. C. 24, at p. 34.

(6) (1877) 4 Ch. D. 739 at p. 793.

1904.

HARY
v.
VISHNU.

concur with Mr. Justice Batty that a reference should be made to a Full Bench, but looking to the similarity between the stipulations about the (previously) unsecured earlier debt in Exhibit 23 and in the mortgage document in *Sunder v. Bapuji*⁽¹⁾ and the remark of Sargent, C. J., therein I think it unnecessary to express at this stage an opinion whether upon a proper construction of the document Exhibit 23 (which is stamped for Rs. 6,500) it must be taken that the parties intended to include in the mortgage transaction the previously unsecured debt (Rs. 5,000) and I would prefer to widen the terms of the reference so as to cover this point as follows:—Whether upon a proper construction of the instrument (Exhibit 23) the property comprised therein has been made security for the prior and the subsequent debts or a charge created in respect of the prior debt or whether the agreement so far as it relates to the earlier debt amounts merely to a clog on an equity of redemption not enforceable.

The reference was argued before a Full Bench consisting of Chandavarkar, Batty and Aston, JJ.

H. C. Coyaji and *W. R. Kerkar*, for the appellant.

Branson (with him *S. R. Bakhle*), for the respondent.

CHANDAVARKAR, J.:—The first question arising on this reference, whether the debt of Rs. 5,000 is secured on the property as a charge by way of mortgage, depends upon a proper construction of the deed, Exhibit 23, by the light of its terms and surrounding circumstances. In the deed itself we have the fact recited that this debt of Rs. 5,000 due on a previous khata had become payable under a bond and for the liability thereunder was substituted a fresh liability under this deed, whereby the debtor obtained a period of two years from its date for the repayment of Rs. 5,000 with interest at the rate of Rs. 1-2-0 per cent. per mensem. The result of the transaction so far was that the old liability of the debtor was extinguished and the creditor could sue him only on and according to the terms of Exhibit 23. This fresh liability with the extinction of the old has some bearing on the question whether the amount of Rs. 5,000 was intend-

ed to be a mortgage debt like the other debt of Rs. 1,500 in this deed. By one of the terms in Exhibit 23 the debtor undertook to repay the amount of Rs. 5,000 with interest within two years out of moneys which he expected to receive from Mantri. The fund which the debtor was entitled to receive from Mantri was made the primary source of repayment—"the security," in the words of the deed, for the sum of Rs. 5,000 and interest. But it could be security only when it came actually into the hands of the debtor. Mantri might or might not pay. The parties therefore appear to have contemplated the contingency of Mantri not paying at all, and they studiously provided for it in the deed by the stipulation that should the debtor have to redeem the property, in express terms mortgaged for the other debt of Rs. 1,000 by the same deed, he should "not lay claim to the property mortgaged" unless he paid off "both the sums wholly". That is, if the debt of Rs. 5,000 should remain unpaid within two years, it should be treated just like the other debt expressly charged on the property as a mortgage; that, in fact, the two debts should be dealt with in that event not as separate but as one, and the property should be redeemed on that footing. This language of the stipulation must be construed by the light of the facts apparent from the deed itself, *viz.*, that the debt of Rs. 5,000 due under the old bond was gone and became merged in the transaction evidenced by this deed, Exhibit 23, and that the debtor had to provide for the contingency of Mantri's failure to supply him with the funds out of which he primarily promised to discharge this debt of Rs. 5,000. So construed, the language of the deed leaves little doubt that the intention of the parties was to burden the property with the debt of Rs. 5,000 at the end of two years from its date. Indeed, that such was their intention is conclusively shown by the fact that they have stamped the deed as a mortgage for both the sums. The contract as to Rs. 5,000 forms part, to borrow the language of West, J., in *Appa v. Bahirji*⁽¹⁾, of the same agreement embraced in the same memorial as that relating to the contract as to Rs. 1,500 and must be construed and given effect to as a whole.

1904.

HARI
v.
VISHNU.

(1) (1875) P. J. p. 862.

1904.

HARI
v.
VISHNU.

But then it was urged by Mr. Coyaji, who argued the case for the appellant with his usual ability and conciseness, that this construction of the deed was opposed to the difference between the language employed as to the debt of Rs. 5,000 and that as to the other debt of Rs. 1,500. No doubt, after agreeing to pay Rs. 5,000 within two years from the moneys which he expected to get from Mantri, and after speaking of those moneys as "security" for that sum, the debtor goes on to say that he mortgages the property mentioned in the deed for the sum of Rs. 1,500. Mr. Coyaji's argument, as I have understood it, was that the express mention of a mortgage with reference to Rs. 1,500 must be taken as an implied exclusion of Rs. 5,000 from that category. The answer to that argument, however, is that it might have prevailed if the language of the deed had been no more than that on which Mr. Coyaji relies. From the beginning the property stood mortgaged for Rs. 1,500 only and the debt of Rs. 5,000 was personal for two years from the date of the deed. It was only on the expiry of two years from the date of the deed that the right of the creditor to look to the property as security for Rs. 5,000 also arose. The writer of the deed appears to have fastened his mind upon this difference in point of liability between the two debts, and with a view to give effect to it, he appears to me to have used the language on which Mr. Coyaji lays stress. He might have no doubt said in express terms that on the expiry of the two years the property should stand mortgaged for Rs. 5,000 also; but we must not construe too narrowly the language of the document drafted apparently by one not versed in the technical terminology of law. The writer of the deed seems to me to have used as to Rs. 5,000 a more elliptical form of expression at the end of the deed than that used in the previous part of it as to Rs. 1,500, to convey the intention of the parties, apparent from the whole of the deed and surrounding circumstances, that the property should stand mortgaged for both the sums, if the sum of Rs. 5,000 were not repaid within two years from moneys that might be received from Mantri.

I need not discuss at length the decided cases mentioned in the referring judgments, because the question in each of them was, whether, upon the deed there concerned, there was a charge

by way of mortgage in respect of the amount, on the payment of which, together with the other amount expressly made a charge, the right of redemption was made conditional. A decision on the construction of one document cannot be taken to govern the construction of another, and these decided cases can be of little use in the construction of the deed with which we are here concerned. Moreover, it is clear from the terms of the documents in all those decided cases that they are distinguishable from the terms here. For instance, in *Rama v. Martand*⁽¹⁾ the Court held that, as the terms were obscure, there was no reason for differing from the view of the Lower Courts that a charge by way of mortgage was not intended. In *Hari Mahadaji Savarkar v. Balambhat Khare*⁽²⁾ the mortgage was only for Rs. 152, but the mortgagor subsequently contracted fresh debts, for which he passed two bonds in which he stipulated that he would pay those debts before redeeming the mortgage. The two transactions—that of the mortgage and that of the bonds—were different and there is nothing in the report of the case to show that the bonds were stamped as mortgage-deeds. In *Yashvant Shenvi v. Vithoba Sheti*⁽³⁾ the mortgage was for Rs. 64 only, but the deed contained a stipulation on the part of the mortgagor to redeem on payment of the mortgage-debt and another debt due on a separate bond. This bond was not cancelled but kept alive as creating a separate liability in spite of the stipulation in the mortgage-deed. That is clear from the stipulation in the mortgage-deed that the mortgagor should pay the mortgage-debt and the bond-debt and take back the mortgage-deed and the bond and then redeem the property. The Court held, under those circumstances, that the bond-debt was not made a charge on the mortgaged property. In the report of this case also there is nothing to show that the mortgage-deed was stamped as a mortgage for both the debt expressly charged by way of mortgage and the bond-debt. In *Sundar Malhar Patel v. Bapuji Shridhar*,⁽⁴⁾ the mortgage was for Rs. 700 and at the same time the mortgagor executed a bond for Rs. 500; in the mortgage-deed he stipulated that he should redeem the property on payment of

1904.

HARI
v.
VISHNU.⁽¹⁾ (1884) 9 Bom. 236 f. n.⁽²⁾ (1884) 9 Bom. 233.⁽³⁾ (1887) 12 Bom. 231.⁽⁴⁾ (1893) 18 Bom. 755.

1904.

HARI
v.
VISHNU.

both the sums; and the mortgage-bond was stamped as for a mortgage-debt of Rs. 1,200. But the Court did not think it necessary to express a decided opinion on the contention raised in the case that Rs. 500 were charged on the property by way of mortgage. The decision in *Krishnaji v. Maheshvar Lakshman Gondhalekar*⁽¹⁾ followed that in *Yashvamt Shenvi v. Vithoba Sheti*.⁽²⁾ The mortgage was expressly for a certain amount and certain money debts were secured by bonds, one term of which was that the money debts should be paid off before the mortgage was redeemed. These money debts formed a separate liability arising out of bonds not stamped as mortgage-deeds, and the mortgage-deed was not stamped as for a mortgage-debt comprising the amount expressly charged and the money debts also.

None of these cases has, in my opinion, any close resemblance to the present, except the decision in *Sundar Malhar Patel v. Bapuji Shridhar*,⁽³⁾ where, however, the question now before us was left open.

For these reasons my answer to the reference is that the property mentioned in Exhibit 23 is mortgaged for the sum of Rs. 5,000 and interest payable thereunder as also for Rs. 1,500—with this difference that the mortgage as to the former took effect on the expiry of two years after the date of Exhibit 23; and that no question as to a clog on the equity of redemption arises in the case.

BATTY, J.:—I concur and think the provisions in the document relating to the sum of Rs. 5,000 amount to a mortgage. They would certainly fall within the first paragraph of clause (a) of section 58 of the Transfer of Property Act, and would not operate to create a condition precedent clogging the equity of redemption.

ASTON, J.:—I also concur.

In my opinion, the stipulations in the instrument (Exhibit 23) regarding the prior debt of Rs. 5,000 do not upon a proper construction of the terms of that document (which is stamped as for a mortgage up to Rs. 6,500) constitute merely a collateral agreement outside the transaction of mortgage giving to the

(1) (1895) 20 Bom. 346.

(2) (1887) 12 Bom. 231.

(3) (1893) 18 Bom. 755.

mortgagor " under the colour of a mortgage a distinct collateral advantage " (see *Broad v. Selfe*,⁽¹⁾ and *Noakes v. Rice*⁽²⁾), but they, I think, constitute a part of the transaction of mortgage entered into between the parties to that deed (Exhibit 23) and create a " mortgage " as defined in section 58 of the Transfer of Property Act IV of 1882 and make the property comprised in the deed security for the prior debt on the conditions and terms set out in the document.

I therefore concur in the judgments of my learned colleagues that the answer to the reference should be in the terms set out in the judgment of Mr. Justice Chandavarkar.

(1) (1863) 9 Jur. (N. S.) 885.

(2) (1902) A. C. 24.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Batty.

SAMAL AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, v. BABAJI BALU JADHAV AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

1904.

February 8.

Lis pendens—Mortgage-decree—Execution proceedings—Purchase at a Court-sale under another decree—Pendency of the execution proceedings.

On the 16th February, 1883, R. obtained a decree on a mortgage against B. While execution proceedings under this decree were pending, a money-decree was obtained against B. by another person; and at a Court-sale held in execution thereof, the property was purchased by S. on the 18th December, 1886. S. obtained his certificate of sale on the 20th December, 1887, and obtained possession of the property on the same day. S. subsequently sold the property to the defendants, who came into possession of the property. The execution proceedings under the mortgage-decree terminated in the sale of the property, which was purchased by R. R. obtained his certificate of sale on the 5th September, 1887, and sold the property to the plaintiffs. The plaintiffs sued to recover possession from the defendants:

Held, that, under the law as it stood before the Transfer of Property Act came into force, as the purchase on which the defendants relied took place during the pendency of the proceedings in execution of the mortgage-decree, it

* Second Appeal No. 685 of 1902.

1904.

SAMAL
v.
BABAJI.

was affected by *lis pendens* and was therefore void as against the plaintiffs who were purchasers under the mortgage decree.

Shivjiram v. Waman⁽¹⁾ followed.

SECOND appeal from the decision of J. E. Modi, First Class Subordinate Judge, A. P., at Thána, reversing the decree passed by C. R. Karkare, Subordinate Judge of Mahád.

Suit to recover possession of land.

The lands in suit belonged originally to Balu *alias* Bhagoji Govind Jadhav. He mortgaged them to Raghunath Ganesh Joshi. Raghunath obtained a decree on his mortgage (in suit No. 6 of 1883) on the 16th February, 1883. The property was sold at a Court-sale on the 25th February, 1887, and was purchased by the decree-holder Raghunath himself. The sale certificate was issued to Raghunath on the 5th September, 1887. In 1888, Raghunath sold the lands to the plaintiffs.

While the execution proceedings under the mortgage-decree were pending, the same lands were sold under a money-decree obtained by a third person against Balu. At this sale Sadashiv became the purchaser on the 18th December, 1886. He obtained his certificate of sale on the 20th December, 1887, and obtained possession of the lands on the same day. Sadashiv then sold the lands to the defendants, who were in possession thereof since the date of the sale.

The plaintiffs who were purchasers from Raghunath filed this suit to recover possession of the lands from the defendants.

The Subordinate Judge dismissed their claim; but on appeal, their claim was awarded by the First Class Subordinate Judge, A. P., who held that the purchase relied on by the defendants was affected by *lis pendens* and was therefore void.

The defendants appealed to the High Court.

G. K. Parekh, for the appellants.

H. C. Coyaji, for the respondents.

CHANDAVARKAR, J. :—The facts on which the determination of this second appeal turns are undisputed and are as follows. On the 16th February, 1883, one Raghunath Ganesh Joshi obtained a

⁽¹⁾ (1897) 22 Bom. 939.

decree on a mortgage against one Balu *alias* Bhagoji Jadhav. The decree directed that in default of payment of the mortgage-debt by Balu, the property, which is in dispute now, should be sold and the debt realized. In the meantime, while execution proceedings under the mortgage-decree were pending, a money-decree was obtained against Balu by another person and at a Court-sale held in execution thereof the said property was purchased by one Sadashiv Prabhakar on the 18th of December, 1886. Sadashiv obtained his certificate of sale on the 20th of December, 1887, and apparently he obtained possession on that date. The defendants claim the property under a sale by Sadashiv and are in possession. In execution of the mortgage-decree the property was brought to sale and purchased with the Court's permission by the decree-holder Raghunath himself. He obtained his certificate of sale on the 5th of September, 1887, and sold the property to the plaintiffs who have sued to recover possession from the defendants.

The rights of the parties, under these undisputed facts of the case, have to be determined by the law as it stood before the 1st of January, 1893, when the Transfer of Property Act came into force in this Presidency. It is clear from those facts that the purchase on which the defendants rely took place during the pendency of the proceedings in execution of the mortgage-decree of Raghunath. That purchase, therefore, was affected by *lis pendens* according to the principle of the decision of this Court in *Shivjiram v. Waman*⁽¹⁾ where Farran, C. J., and Candy, J., held that execution proceedings under a mortgage-decree revive *lis pendens* and a purchase made during their pendency is void and cannot affect a purchase under the decree. The same Bench followed the decision in *Shivjiram v. Waman*⁽¹⁾, in *Lope v. Barve*⁽²⁾ where they said:—"The District Judge in this case has overlooked the fact that the defendant purchased after the plaintiff had obtained a decree for sale of the mortgaged premises and pending execution proceedings to enforce that decree. The plaintiff's *lis* was still *pendens* when the defendant purchased: (*Shivjiram v. Waman*).⁽¹⁾ The defendant by purchasing the property after the plaintiff's suit had been instituted could not lessen

1904.

 SAMAL
 v.
 BADAJI.

(1) (1897) 22 Bom, 939.

(2) (1898) P. J. p. 39.

1904.
 SAMAL
 v.
 BABAJI.

or in any way derogate from the plaintiff's right to bring the property to sale and confer an absolute right to the property upon the purchaser in execution."

These remarks apply on all fours to the present case, where, as in the case of *Lope v. Barve*⁽¹⁾, the defendant claims under a purchase at a Court-sale in execution of a money-decree. Further *Shivjiram v. Waman*⁽²⁾ was followed by another Bench of this Court (Parsons and Ranade, JJ.) in *Rachappa Nilkanthappa v. Mangesh Mahadaji Sharaff*.⁽³⁾ We are bound by these decisions which apply to the facts of this appeal. We therefore confirm the decree with costs.

Decree confirmed.

(1) (1898) P. J. p. 38.

(2) (1897) 22 Bom. 939.

(3) (1898) P. J. p. 386.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Batty.

MALUKCHAND AMARCHAND (ORIGINAL PLAINTIFF), APPELLANT, v.
 MANILAL NANSHA (ORIGINAL DEFENDANT), RESPONDENT *

1904.
 February 8.

Registration Act (III of 1877), sec. 17 (e)—Composition deed—Conveyance—Trustees under the deed.

The expression "composition deed" as used in section 17 (e) of the Registration Act (III of 1877) denotes a transaction entered into by a debtor, insolvent or in embarrassed circumstances, with his creditors with the object of paying the latter a composition upon their claims. The deed must in substance be of the nature of a composition, not a conveyance. Hence, where a debtor transfers his property to a creditor or creditors in consideration of his debts, *i.e.*, where he parts with his rights absolutely, the transaction may partake of the nature of a composition, but it is in reality a conveyance. It is otherwise where with the consent of his creditors he parts with his property in favour of a trustee for the purpose of paying the composition upon the claims, and the trustee is authorized to deal with the property for that purpose.

A composition deed for the benefit of all the creditors, not comprising the whole of the property of the judgment-debtor, is not void, if the transaction is

* Second Appeal No. 448 of 1903.

fair and *bona fide* and in the ordinary course of business or upon the pressure of the creditors. It does not become void by the circumstance that it is signed by some only of the creditors and that among them are some whose debts are barred by limitation.

1904.

MALUK-

CHAND

v.

MANILAL

SECOND appeal from the decision of P. E. Percival, Joint Judge of Ahmedabad, confirming the decree passed by Vadilal T. Parekh, Joint Subordinate Judge of Ahmedabad.

The plaintiff obtained on the 19th April, 1901, a money-decree against one Chhaganlal Parshottam in suit No. 320 of 1900. He preferred a *darkhast* (application) No. 661 of 1901 for execution of the decree and got the house in dispute attached.

Chhaganlal Purshottam passed a composition deed on the 14th December, 1900, whereby Chunilal Vakhatchand, Chunilal Chhotalal and Mohanlal Khushal were appointed trustees. It was signed by the judgment-debtor and some of his creditors, but it was not registered; and the judgment-debtor made over to the trustees his immoveable property, account books and goods for sale on the day he signed the deed.

The trustees sold the house in dispute to the defendant on the 5th June, 1901, for Rs. 1,760; and handed over possession to him. On the 21st October, 1901, the defendant got the attachment by the plaintiff raised.

The plaintiff then filed a suit for a declaration that he had a right to attach and sell the house in suit in execution of his decree, alleging that the composition deed was not valid, as it was not registered; that all the property of the judgment-debtor was not mentioned in the deed; that some property was fraudulently concealed by the judgment-debtor; that it was signed by some creditors whose claims were barred by limitation; that the trustees appointed under the deed fraudulently passed a deed of sale to the defendant; and that the deed of sale was nominal.

The Subordinate Judge dismissed the plaintiff's suit holding that the sale to defendant was not nominal and fraudulent, and that the trustees under the deed were authorized to sell the house.

This decree was on appeal confirmed by the Joint Judge.

The plaintiff preferred a second appeal.

1904.

MALUK-
GHAND.
v.
MANILAL

Manmukhram K. Mehta, for the appellant (plaintiff):—The composition deed requires registration, as it relates to immoveable property. Although it is styled a composition deed, it is more than that: trustees are appointed and property is transferred to them. Under section 5 of the Indian Trusts Act (II of 1882) the trust in relation to immoveable property is not valid, as the deed is not registered. The case of *Subbaraya v. Vythilinga*⁽¹⁾ is distinguishable. In it, the effect of section 5 of the Trusts Act was not considered. If it be held that the deed requires registration, then the trust is invalid and the defendant gets no title. The deed is also invalid under section 53 of the Transfer of Property Act (IV of 1882), as it was passed fraudulently with the intention of defeating the judgment-creditor.

V. G. Ajinkya, for the respondent (defendant):—Both the Lower Courts have found as a fact that the defendant was a *bond fide* purchaser for value, and that the deed in question is a *bond fide* transaction without any intention on the part of the debtor to defraud creditors. This being a concurrent finding of fact, is binding on this Court.

The deed in question being a composition deed does not require registration: see Registration Act (III of 1877). The mere fact that the debtor wishes that the composition should be carried on in a particular manner does not change the nature of the deed so as to require registration under section 5 of the Trusts Act (II of 1882). It may be a trust deed and yet it may fall within the exemptions under section 17 of the Registration Act (III of 1877). We rely on *Subbaraya v. Vythilinga*.⁽¹⁾

CHANDAVARKAR J.:—The first question in this second appeal is whether the deed, Exhibit 37, which is called a composition deed in the document itself and so treated by the Lower Appellate Court, is void for want of registration under the Indian Trusts Act, because the property is vested by the deed in a trustee and so made subject to a trust. The Lower Appellate Court has held that the deed, being a composition deed, did not require re-

(1) (1892) 16 Mad. 85.

1904.

MALURCHAND

v.
MANILAL.

gistration, according to cl. (e) of section 17 of the Indian Registration Act. But it is urged for the appellant that as it is a trust deed, it cannot be valid unless registered, as required by section 5 of the Trusts Act. It is not unusual, however, for a composition deed to be at the same time a trust in the sense that a trustee is appointed by the debtor with the consent of the creditors who join it for the purpose of giving effect to the composition. Cl. (e) of section 17 of the Registration Act was obviously intended to exempt from registration "any composition deed," that is, every deed the essence of which is composition and the trust enters into it as a mere accident. In a trust deed the owner of the property parts with his ownership in favour of a trustee who becomes the owner for another person who is called the *cestui que trust*. In a composition deed, whereby a debtor compounds with his creditors and places all his property at the disposal of a trustee with the consent of his creditors for the purposes of the composition, the trustee is appointed only for the purpose of giving effect to the terms of the composition and the property of the debtor vests in the trustee only for that purpose. The ownership of the property remains in the debtor and the property is transferred to the trustee for the benefit of the creditors, that is, subject to the right of the latter under the deed to have their debts as compounded paid out of the property through the medium of the trustee. The mere fact, therefore, that a certain kind of trust enters into its constitution and character is not sufficient to take the deed out of the category of a composition deed within the meaning of cl. (e) of section 17 of the Registration Act, where the composition is either its main purpose or unchangeable characteristic and the trust is only incidental.

The term "composition deed" is not indeed defined in the Registration Act, but it is a well known term of art, familiar to lawyers, and used of a transaction entered into by a debtor, insolvent or in embarrassed circumstances, with his creditors with the object of paying the latter a composition upon their claims. As was pointed out in *Ex parte Milner*⁽¹⁾ there may be a composition between a debtor and his creditors under the provisions of a Statute and there may be what is called a

(1) (1885) 15 Q. B. D. 605.

1904.

MALUKOHAND
v
MANILAL.

common law composition, not entered into under the provisions of any Statute. The insolvency or embarrassed circumstance of the debtor is one essence of a composition deed. Another essential feature of it is that, where the debtor with the consent of his creditors appoints a trustee to take charge of all his property for the purpose of giving effect to the composition, the trustee is a trustee for the creditors, only to the extent of that purpose, but no right to the property itself is transferred to the creditors. The trustee holds the property for the debtor, who remains in the eye of law the owner, and for the benefit of the creditors. In one sense no doubt there is a transfer of the property to the trustee, and to that extent the debtor's right, title or interest is extinguished and a right is created in the trustee. But as the transfer of the right to the trustee and the extinction of the right of the debtor are of a limited or qualified character, and the trustee, so far as the ownership of the property is concerned, is a trustee for the debtor and his creditors, the Legislature would appear to have provided that a deed of this kind should not fall within the class of compulsorily registrable documents mentioned in clauses (b) and (c) of section 17 of the Registration Act. The exceptions in section 17 of the Act to clauses (b) and (c) seem to be framed upon the principle that where either a document affects immoveable property *indirectly* by extinguishing a right existing in favour of one person and creating a right in favour of another or where otherwise it is a document with the *inherent* characteristic of publicity, such as a decree of a Court or an award, or a grant of immoveable property made by Government, it is not necessary to register it. A composition deed whereby a trustee is appointed to pay the composition out of the debtor's property is one instance of such an *indirect* transfer, and, moreover, it is attended by a certain amount of publicity. The next exception mentioned in cl. (f) is an instrument relating to shares in a Joint Stock Company, where the assets of such Company consist in whole or in part of immoveable property. There, again, when a shareholder in the Company transfers his shares to another, he in effect transfers his right to or interest in the immoveable property of the Company, but the transfer is in that respect, and so far as it affects immoveable property, *indirect* as in the case of a composition deed.

These considerations are sufficient to make it clear that when the Legislature says that a composition deed need not be registered it means that the deed must in substance be of the nature of a composition, not a conveyance. Where a debtor transfers his property to a creditor or creditors in consideration of his debts, *i. e.*, where he parts with his rights absolutely, the transaction may partake of the nature of a composition but in reality and substance it is not a composition but a conveyance. It is otherwise where with the consent of his creditors he parts with his property in favour of a trustee for the purpose of paying the composition upon the claims and the trustee is authorized to deal with the property for that purpose.

Now, the deed in the present case falls within the latter description. Certain immoveable and moveable property of the debtor and his account books are vested in the trustee for the purpose of paying his creditors. There is no conveyance of the immoveable property of the debtor to the creditors. Under these circumstances we think the Lower Courts were right in holding that the deed fell within the exemption cl. (e) of section 17 of the Registration Act. The deed recites that the composition is for the benefit of *all* the creditors and all of them are to derive equal benefit from it.

The next question is, whether the transaction evidenced by this deed was sham. Upon this point some of the facts surrounding the transaction have to be borne in mind. One of them is that the property covered by the deed does not exhaust the whole of the debtor's assets but is only a part thereof, though a substantial part, the rest being left with the debtor for his benefit. This circumstance by itself is, however, no badge of fraud. "If a person assigned *part* only of his property in trust for creditors, then, if the transaction was *fair* and *bona fide*, and in the ordinary course of business, or upon the pressure of the creditors, it was not open to objection; but if the settlor contemplated bankruptcy or even thought it probable, though not inevitable, and wished to give an undue preference to certain creditors over others, it was *fraudulent*, and constituted an act of bankruptcy." (Lewin on Trusts, p. 565, 9th Edition⁽¹⁾.) None of the circumstances alleged against the deed and found proved

1904.

MALUCHAND

v.
MANILAL.⁽¹⁾ 10th Edition p. 563.

1904.

MALUKOHAND
v.
MANILAL.

by the Lower Courts falls within the latter class of cases. The transaction was clearly intended for the benefit of all creditors, and plaintiff is not suing for and on their behalf. Therefore, section 53 of the Transfer of Property Act has no application. The object of the deed, as is apparent from its recitals and terms, was that all the creditors of the debtor should be paid their debts rateably or proportionately by the trustees. It is true that as a matter of fact only some of the creditors have signed the deed, and among these are creditors whose debts were barred by limitation at the date of the deed. The creditors who have not joined can nevertheless take benefit under the deed, but they cannot impugn it except on the ground that it represents a sham or fictitious transaction—which, however, cannot be said of the deed on the findings of the Courts below. Nor is the fact that creditors whose claims are time-barred are parties to the deed sufficient in law to invalidate the transaction. As pointed out by the Subordinate Judge, though among the creditors who have joined the deed there are some whose debts are time-barred and who cannot legally enforce their payment, it may be—we do not say it is—open to the trustees, whose duty it is to pay off debts legally payable, to decline to recognise the barred claims before paying off claims not barred. At any rate, what the rights of the creditors whose claims are barred are under the deed is a question which may arise when the trustees either proceed to pay the creditors or decline to pay them, but we do not think that the mere fact that these creditors have assented to the deed is indicative of bad faith on the part of the debtor and all the creditors, who have assented to the deed, or proof that the transaction is colourable. There is no other circumstance in the case affecting the good faith of the transaction or its genuineness. It was found by the Subordinate Judge, and the fact has not been disputed before us, that the trustees, acting under the deed, had issued public notices appointing a day for the sale of the property and that the defendant had become its purchaser having bid at the highest price. Under these circumstances we see no ground of law for disturbing the finding of the Court below that the composition deed is not fictitious or vitiated by fraud or want of good faith. We confirm the decree with costs.

Decree confirmed.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

HARI LAHU PATIL (ORIGINAL PLAINTIFF), APPELLANT, *v.* RAMJI VALAD PANDU AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1904.

February 11.

Transfer of Property Act (IV of 1882), sections 58, 60 and 86—Contract Act (IX of 1872), section 16—Mortgage—Sawaikhichadi—Interest on instalment in default—Mortgage enforceable in its entirety—Each case to be decided by its own circumstances.

A mortgage deed, both the parties to which were money-lenders, purported to be a security for Rs. 5,000 as principal and Rs. 1,250 *sawai*, repayable by 72 instalments. The *sawai*, which equalled one-fourth of Rs. 5,000, was to take the place of interest. The sum of Rs. 5,000 was made up as follows:—Rs. 4,812-8 were paid to the mortgagor in cash, Rs. 87-8 were retained by the mortgagee on account of the first instalment and Rs. 100 were retained on account of *khichadi* (bonus). The mortgagee having brought a suit to recover the mortgage-debt, namely, Rs. 7,995, and a question having arisen whether the mortgage was so unconscionable as to be unenforceable in its integrity,

Held, that under the circumstances of the case, the mortgage was enforceable in its integrity.

PER CURIAM:—The principles of justice, equity and good conscience do not of necessity disentitle a mortgagee from insisting on his security for a greater sum than what has been actually advanced: in each case the question must be asked whether there has or has not been a hard and unfair bargain on the borrower, but when that is not established against the mortgagee then the right to redeem still remains, though it is redeeming not on payment of the sum advanced, but of the sum which the parties agreed it was worth the mortgagor's while to pay in order to get a smaller advance when he was in want of money.

Each case must be determined according to its own circumstances.

Held, further, that there was nothing illegal in the provision for the payment of *sawai*.

PER CURIAM:—The Courts do not lean towards compound interest, they do not award it in the absence of stipulation, but where there is a clear agreement for its payment, it is in the absence of disentitling circumstances allowed.

APPEAL from the decision of H. S. Phadnis, Assistant Judge of Dhulia, in Original Suit No. 240 of 1902.

The plaintiff sued to recover Rs. 7,995-0-0 (Rs. 4,837-8-0 principal and Rs. 3,357-8-0 interest) and interest from date of suit at 2 per cent. per month and costs by sale of property mortgaged by

1904.

HARI
v.
RAMJI.

one Pandu, the deceased father of defendants 1—5 on the 17th September, 1895. The following is the material portion of the mortgage-deed sued on :—

I (Pandu) borrowed a debt from your shop and gave you in writing an instalment (bond) for Rs. 5,000 principal together with *sawai* (25 per cent.) namely, Rs. 1,250, in all Rs. 6,250, including the *sawai*. The said amount will be repaid by 71 instalments of Rs. 87-8 each per month from this day and by the last, that is, the 72nd instalment of Rs. 37-8. Thus the whole amount of all the instalments will be paid off. In default of payment of instalments month after month as per this agreement, I will pay interest at 2 per cent. per month on the amount of the unpaid instalment. I will not raise any objection to the payment of the instalment with interest and will continue to pay interest (on the instalment) till the instalment is paid off. * * * * *

Rs. 187-8-0 Rs. 87-8 on account of the first instalment (due) this day and Rs. 100 on account of *khichadi* (bonus), in all Rs. 187-8, allowed deduction for.

„ 4,812-8-0 Paid (by you) in cash this day and received by me.

Rs. 5,000-0-0

Defendant 6 was made a party because he was a subsequent mortgagee of a part of the property in suit, and defendant 7 was joined because he was a subsequent purchaser of a part of the property.

Defendants 1—5 admitted the execution of the mortgage-deed and contended that they received only Rs. 4,287-8 as plaintiff did not pay them Rs. 525 and deducted Rs. 100 as *khichadi* (bonus) and Rs. 87-8 as the first instalment; that they did not admit the *sawai* of Rs. 5,000; that in addition to the *sawai* interest at 24 per cent. on the instalments was unjust and exorbitant; that they paid to the plaintiff Rs. 800 on the 13th September, 1896, and Rs. 600 on the 26th March, 1899; that by the acceptance of the said payment of Rs. 1,400 the plaintiff had waived his right to claim the whole amount at once and it was so agreed at those payments, and that they were willing to pay the balance that would be properly found to be due to plaintiff by instalments of Rs. 500 each.

Defendant 6 pleaded that as he had no knowledge of the plaintiff's mortgage when he took his own mortgage, there should be marshalling and the fields mortgaged to him should be put to sale after the other property was sold to make up the deficiency, if any.

Defendant 7 was absent.

The Subordinate Judge found that defendants 1—5 had received Rs. 525; that the plaintiff was not legally justified in deducting Rs. 100 as *khichadi* and he was not entitled to interest thereon and on Rs. 87-8 the amount of the first instalment; that the plaintiff was not legally justified in increasing the nominal amount of the principal in pursuance of the alleged rule of *sawai*; that the plaintiff had not waived his right to demand the whole amount at once; that the rate of interest was exorbitant and it should be reduced to 9 per cent., and that the plaintiff's mortgage was valid and binding as against defendants 6 and 7. On these findings the Subordinate Judge passed the following decretal order:—

Plaintiff included *sawai* and *khichadi* in the suit under the *bond fide* belief that he was entitled thereto, so I award him full costs.

Rs. 5,293-9-8 with interest thereon at 9 per cent. per annum from date of suit until payment and full costs to be recovered by sale of the mortgaged properties agreeably to the provisions of the Transfer of Property Act, section 88. In the sale, properties, except those mortgaged to defendant 6, should be put to auction first, and deficiency only, if any, to be recovered by the sale of the excepted properties; if any excess in the latter sale it should go to defendant 6 to the extent of his mortgage claim, and the nett balance in either sales should go to defendants 1—5. Defendants to bear their respective costs.

The plaintiff having appealed,

M. B. Chaubal appeared for the appellant (plaintiff).

P. P. Khare appeared for the respondents (defendants).

JENKINS, C. J.:—The question before us is whether a mortgage obtained by the plaintiff is so unconscionable as to be unenforceable in its integrity.

The document is dated the 17th September, 1895, and purports to be a security for Rs. 5,000 as principal and Rs. 1,250 as *sawai*, repayable in 72 instalments, the last being of Rs. 87-8-0, and those that precede it of Rs. 87-8-0.

The sum of Rs. 5,000 was made up as follows: Rs. 4,812-8-0 was paid in cash, Rs. 87-8-0 was retained on account of the first instalment and Rs. 100 was retained on account of *khichadi*. The *sawai* is said to take the place of interest and is one-fourth of the Rs. 5,000.

1904.

HARI
C.
RAMJI.

1904.

HARI
v.
RAMJI.

The bond further provides that on any instalment in arrear, interest shall run at the rate of 24 per cent. per annum. It is objected that the mortgage should not be enforced so far as it provides for *khichadi*, *sawai*, and interest on instalments in arrear, and this view has been adopted by the Assistant Judge from whose decree the present appeal is preferred.

A mortgagor's right to redeem is defined by section 60 of the Transfer of Property Act, which provides that at any time after the principal money has become payable, the mortgagor has a right on payment of the mortgage money to redeem. The mortgage money is the principal money and interest of which payment is secured for the time being (see section 58).

In the same way a mortgagee, who is foreclosing, is entitled to an account of what will be due to him for principal and interest on the mortgage (section 86). A mortgage, we are told by section 58, is a transfer "for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability."

How far then is the mortgagee in this suit seeking a remedy beyond that which the Transfer of Property Act sanctions, or asserting a claim at variance with the mortgagor's right of redemption?

To answer this question we must examine the several items to which objection is taken, and, as far as possible, determine their exact nature.

Now *khichadi* in this case refers to a sum which forms part of the principal amount expressed to be secured by the mortgage; it is not however paid to the mortgagor; it is retained by the mortgagee. For what purpose it is retained is not clear, but it is certain that it is of no direct benefit to the mortgagor.

Therefore it cannot be regarded as a loan or part of a loan in the strict sense of the term, unless recourse be had to the fiction to which Chitty, L. J., alludes in *Biggs v. Hoddinott*.⁽¹⁾ But the sums that can be secured by a mortgage are not limited to those which are advanced by way of loan (see section 58 of the

⁽¹⁾ (1898) 2 Ch. 807 at p. 322.

Transfer of Property Act) and there is nothing in the words of the Act, which forbids a mortgage being a security for more than is actually advanced. Still in ordinary cases the Courts in the absence of distinct agreement will allow a mortgage to stand only for the amount advanced: *Potter v. Edwards*.⁽¹⁾

The legal position in somewhat similar circumstances has thus been described by Lord Hatherley in *Wallingsford v. Mutual Society*⁽²⁾: "The basis of the whole transaction, of course, is contract, and in this particular case we have before us a sum of £6,000 in money or money's worth advanced on a given day, and the contract is that at a distant day a much larger sum, exceeding, in fact, or nearly amounting to double the original sum, is to be paid by quarterly instalments, of which there are to be eighty. That contract is not only contained in the deed, but it is contained in the rules of the society, under which that mortgage deed is made as a security for the performance of those rules. There is nothing to prevent that contract being carried out to the full extent, especially now that the Usury Laws are at an end, and no question can possibly, as it seems to me, arise upon a deed framed as this is, as to whether or not it is a case of penalty or contract. The sum is plainly secured by a contract and that contract must be observed."

Here we have a clear and unambiguous contract to repay a sum which includes the Rs. 100 retained as *klichadi*: how is the defendant to escape from the liability expressed in the document? The common ground of defence in such a case is that the transaction is unconscionable.

Turning to the Contract Act, as we are entitled (see section 4 of the Transfer of Property Act), we find that section 16 as amended by Act VI of 1899 provides:

"(1) A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

"(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another—

(1) (1857) 26 L. J. (Ch.) 468.

(2) (1880) 5 App. Cas. 685 at p. 702.

1901.

HARI
v.
RAMJI.

1904.

HARI

v.

RAMJI.

"(a) Where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or

"(b) Where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

"(3) Where a person, who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other."

But the facts of this case forbid the application of this section. The mortgagor like the mortgagee was a money-lender; it cannot be suggested that he did not thoroughly understand the transaction; it is even conceded before us that he himself makes advances on similar terms; and the evidence excludes the idea that the mortgagee was in a position to dominate his will. If it be argued that section 16 is not exhaustive, and that it does not displace the principles of justice, equity and good conscience, then accepting, but without admitting, this argument as correct, we still think the defendant's position is no stronger.

There is in the evidence no proof of fraud, oppression or unfair dealing, nor is there in the relation of the parties anything to support even a suspicion that the mortgagor was overreached.

The principles of justice, equity, and good conscience, as measured by the equitable doctrines which obtain in the English Courts, do not of necessity disentitle a mortgagee from insisting on his security for a greater sum than what has been actually advanced: in each case the question must be asked whether there has or has not been a hard and unfair bargain on the borrower, but when that is not established against the mortgagee, then the right to redeem still remains, though it is redeeming not on payment of the sum advanced, but of the sum which the parties agreed it was worth the mortgagor's while to pay in order to get a smaller advance when he was in want of money: *Marquess of Northampton v. Pollock*.⁽¹⁾

Therefore we are of opinion that in the circumstances of this case objection cannot be successfully taken to the inclusion of this sum of Rs. 100 in the mortgage money.

⁽¹⁾ (1890) 45 Ch. D. 190 at p. 212.

Then how do matters stand in regard to the *sawai* of Rs. 1,250. It is a sum payable by way of, or perhaps it would be more correct to say in place of, interest, and is repayable with the principal in the stipulated instalments.

We can see nothing illegal in a provision for payment of that sum (see *Wallingford v. The Mutual Society* ⁽¹⁾) while for the reasons we have already given, the bargain cannot be attacked as unconscionable.

It only now remains to consider the exception taken to the provision that interest shall run on an instalment in default.

Now each instalment is made up in part of principal and in part of *sawai* and so far as it consists of principal, we fail to see what objection there can be to its bearing interest if not paid on its due date: if it does not run, then the creditor is kept out of his principal without the compensation of interest.

Let us now consider the effect of the provision so far as it relates to *sawai*: if *sawai* be regarded as interest (and that, as the view most favourable to the respondents' contention, we will assume to be its character) the result of the stipulation is to make interest run on interest. The Courts do not lean towards compound interest, they do not award it in the absence of stipulation, but where there is a clear agreement for its payment, it is in the absence of disentitling circumstances allowed: *Ganga Pershad Sahu v. The Land Mortgage Bank*.⁽²⁾ The rate, 24 per cent. might in ordinary circumstances be regarded as high, but, as between parties situated as those before us are, it is important to bear in mind that it is the rate commonly charged in the locality, and on the facts of this case we see no reason for treating the provision for its payment as a penalty.

Before parting with the case there is one remark we would desire to make, lest any one should be misled by the opinion we have expressed. It was stated before us that the appellant was desirous of obtaining from this Court a decision as to the validity of mortgages of this class which are said to be common in the district from which this case comes.

Though our decision is in the appellant's favour, it is based wholly on the special facts of this case. We have come to the

(1) (1880) 5 App. Cas. pp. 702, 710.

(2) (1893) 21 Cal. 366.

1904.

HARI
v.
RAMJI.

conclusion that as between this mortgagor and this mortgagee, money-lenders on both sides, there was no room for the protection afforded to the victims of unconscionable bargains. Had the mortgagor been an agriculturist (we merely take that as a typical case) the result might and probably would have been different, and it is instructive to note in this connection the 3rd illustration to the 16th section of the Contract Act as amended. In this respect each case must be determined according to its own circumstances.

The decree of the lower Court must, therefore, be varied by substituting Rs. 7,995 for Rs. 5,298-9-8, and it should be expressed in full not merely by reference to section 88 of the Transfer of Property Act. The appellant must get his costs of this appeal.

Decree varied.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

1904.

February 16.

BHAGWANTAPPA BIN RUNGAPPA (OPPONENT), APPELLANT, v.
VISHWANATH AND ANOTHER (APPLICANTS), RESPONDENTS.*

Civil Procedure Code (Act XIV of 1882), sections 225, 228, 244, 588—Decree—Execution—Decree passed without jurisdiction—Jurisdiction—Appeal—Practice.

When a decree passed by one Court is sent for execution to another the latter Court is entitled to go into the question whether the first Court had jurisdiction to pass the decree: and if that Court declines to become the executing Court the order so passed is not an order either under section 244 or section 588 of the Civil Procedure Code, and cannot be appealed against.

APPEAL from the decision of E. H. Leggatt, District Judge of Kánara, reversing the decree passed by G. N. Kelkar, Subordinate Judge of Sirsi.

The applicant obtained a mortgage decree against the opponent in the Court of the Subordinate Judge of Kumta in Suit No. 285 of 1894. The property mortgaged was situated within the local limits of jurisdiction of the Subordinate Judge's Court at Sirsi, and the decree directed sale of that property.

* Second Appeal No. 685 of 1903.

The applicant then presented darkhast No. 298 of 1902 in the Court of the Subordinate Judge of Sirsi for execution of the decree. The judgment-debtor contended that the decree was invalid inasmuch as the Kumta Court had no jurisdiction to entertain the original suit and that it was not open to the Sirsi Court to execute an invalid decree.

The Subordinate Judge of Kumta rejected the darkhast, holding that as the Kumta Court had no jurisdiction to entertain it, the decree was on its face invalid for want of jurisdiction, and was void *ab initio*.

The applicant appealed to the District Judge of Kánara who reversed the decree passed by the Subordinate Judge and directed that execution should proceed. The following were his reasons :

"Under the ruling in the case of *Chogalal v. Trueman* (I. L. R. 7 Bom., p. 481), it is laid down that a Court cannot refuse to execute the decree on the ground that the Court which passed the decree had no jurisdiction but may adjourn the execution proceedings to enable the party interested to make an application to the Court passing the decree.

For the respondents I am referred to the contrary ruling in *Imdad Ali v. Jagan Lal* (I. L. R. 17 All., p. 478), but I am bound by the ruling of the Bombay High Court.

I am also referred to *Haji Musa Haji Ahmed v. Purmananda Nursey* (I. L. R. 15 Bom., p. 216 at p. 219); but that case was concerned with the judgment of a foreign Court and I do not think that the remark on page 219 that the executing Court would decline to consider such an objection because it would be bound by the provision of section 13 of the Code to refuse to retry an issue already determined by the competent Court, can mean that it would only decline if the issue had been specifically raised and decided by the trying Court. For these reasons I hold that the lower Court could not refuse altogether to execute the decree.

I think further that the matter must be considered to be *res judicata*. In the previous *darkhast* No. 165 of 1895 and No. 362 of 1900, the point was not specifically decided, but Exhibit 8 in No. 362 of 1900 shows that the Subordinate Judge had doubts of the jurisdiction of the trying Court. In No. 165 of 1895, however, the Subordinate Judge ordered execution to proceed and no appeal was made against this order. It is true that owing to applicant's default execution was not carried out, but on consideration I think that as no such objection was raised in that *darkhast* and a definite order for execution was passed the question cannot now be raised in a *darkhast* between the same parties. Opponent was bound to raise it at first and not having done so is now barred.

1904.

BHAGWANT-
APPA
v.
VISHWANATH.

1904.

BHA. WANT-
APPA
v.
VISHWANATH.

This being so it is not necessary to consider whether the trying Court had jurisdiction."

The opponent appealed to the High Court.

Nilkantha Atmaram, for the appellant :—In this case the lower Court is wrong when it says that the executing Court cannot refuse to execute the decree on the ground that the Court which passed it had no jurisdiction. Section 225 of the Civil Procedure Code (Act XIV of 1882) clearly recognizes such a power in the executing Court. Section 223 says that the decree may be executed by the Court which passed it or by the Court to which it is sent for execution: and section 228 says that the Court executing a decree sent to it for execution shall have the same powers in executing such decree as if it had been passed by itself. A Court can refuse to execute its own decree if it subsequently finds that it was passed without jurisdiction. If this be so, the executing Court can do so under section 228.

The suit in which the decree was passed was brought on a hypothecation bond and it is admitted that the property was without the jurisdiction of the Court in which the suit was brought. It is therefore clear that that Court would have no jurisdiction: see Civil Procedure Code (Act XIV of 1882), section 16; *Vithalrao v. Vaghoji*.⁽¹⁾ Therefore no duty is cast upon the executing Court to execute the decree: *Haji Musa Haji Ahmed v. Purmanand Nursey* ⁽²⁾; *Imdad Ali v. Jagan Lal* ⁽³⁾; *Muhammad Sulaiman Khan v. Fatima* ⁽⁴⁾; *Abdul Hayai Khan v. Chunia Kuar*.⁽⁵⁾

G. S. Mulgaonkar, for the respondents :—There is a personal covenant to pay in the hypothecation bond, and therefore the case would come under the proviso to section 16 of the Civil Procedure Code (Act XIV of 1882). Again section 223 (c) of the Code contemplates that the decree like the one in question could be executed; and when a certificate is issued as provided for by section 224 the whole defect is cured. We rely upon *Chogalal v. Trueman*.⁽⁶⁾ The case of *Haji Musa Haji Ahmed v.*

⁽¹⁾ (1892) 17 Bom. 570.

⁽²⁾ (1890) 15 Bom. 216.

⁽³⁾ (1895) 17 All. 478.

⁽⁴⁾ (1889) 11 All. 314.

⁽⁵⁾ (1886) 8 All. 377.

⁽⁶⁾ (1883) 7 Bom. 431.

Purmanand Nursey ⁽¹⁾ relied upon by the appellant does not apply, for that was a judgment of a foreign Court.

Nilkantha Atmaram, in reply :—The proviso to section 16 of the Civil Procedure Code (Act XIV of 1882) has no application here: see *Vithalrao v. Vaghoji*.⁽²⁾ It relates to a suit for the specific performance of contracts respecting land and the like. Section 223 (c) of the Code has reference to section 19. It is an error to say that by the grant of a certificate the entire defect is cured. What we contend is not that the decree is defective, but that there is no decree to execute: see *Ali Shah v. Husain Bahksh*.⁽³⁾

CHANDAVARKAR, J.:—The decree of which execution is sought was passed by the Subordinate Judge's Court at Kumta and sent by that Court for execution to the Subordinate Judge's Court at Sirsi, because the lands in respect of which the execution is sought and to which the decree relates are situated within the jurisdiction of the Sirsi Court.

The Subordinate Judge of Sirsi, to whom the decree was sent for execution, finding that the lands in dispute to which the decree relates were situated within his jurisdiction, declined to execute it on the ground that the Kumta Court had no jurisdiction to entertain the suit and pass the decree. From this order an appeal was preferred to the District Judge, who has held that the question of the Kumta Court's jurisdiction is *res judicata* in favour of the decree-holder and directed execution to proceed in the Sirsi Court. The point of *res judicata* has not been relied upon by the respondent before us and the only question properly arising and argued is whether the Sirsi Court had jurisdiction to go into the question of the Kumta Court's jurisdiction to pass the decree sent to it for execution.

Mr Nilkanth has argued that the Subordinate Judge of Sirsi to whom the decree of the Kumta Court was sent for execution had jurisdiction to decide the question whether the Kumta Court's decree was one passed with jurisdiction or not and in support of his contention he has cited *Haji Musa Haji Ahmed v. Purmanand*

(1) (1890) 15 Bom. 216.

(2) (1892) 17 Bom. 570.

(3) (1878) 1 All. 588.

1904.

BLAGWANT
APPA
v.
VISHWANATH.

1904.

BHAGWANT-
APPA
v.
VISHWANATH.

Nursey.⁽¹⁾ Looking at sections 224 and 225 of the Civil Procedure Code, which bear on this point, we find that the Court to which a decree is sent for execution has jurisdiction to decide the preliminary question whether the decree sent to it for execution was passed with jurisdiction or not. Section 225 points out the conditions which must be fulfilled to the satisfaction of the Court to which the decree is sent for execution before it can exercise the functions of an executing Court. The phraseology of that section, as contrasted with the phraseology of section 228, Civil Procedure Code, is very significant. In section 225 it is "the Court to which a decree is sent" while under section 228, it is "the Court executing a decree." It is clear from this that when a decree is sent to a Court for execution, that Court can go into the question of the jurisdiction of the Court passing the decree, if it sees reasons to do so. It is when that Court is satisfied, that the Court passing the decree had jurisdiction that the former is converted from a "Court to which a decree is sent" to a "Court of execution." Therefore so long as the Court to which "a decree is sent" has not been converted into a "Court executing the decree" under section 228, it remains simply a Court to which "a decree is sent" under section 225 and it does not fall within the purview of section 228. If the Court, to which a decree is sent, comes to the conclusion that it has no jurisdiction, then its hands are stayed and the parties have to go back to the Court which passed the decree; the Court to which the decree is sent having declined to become the executing Court: see *Chogalal v. Trueman*.⁽²⁾ This act of the Court to which the decree is sent is not an order either under section 244, Civil Procedure Code, or under section 588; and it cannot be appealed against.

We hold that the District Judge, Kárwár, had no jurisdiction to pass the order which he has passed, as the order of the Subordinate Judge at Sirsi was not appealable. We reverse the order of the District Judge under our Extraordinary Jurisdiction, and leave the parties to take such course as they think proper. Each party to bear his own costs of the appeal to the lower Appellate Court and of the appeal to this Court.

Order reversed.

(1) (1890) 15 Bom. 216.

(2) (1883) 7 Bom. 481.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

GOVIND KRISHNA GUJAR (ORIGINAL PLAINTIFF), APPELLANT, v.
SAKHARAM NARAYAN AND ANOTHER (ORIGINAL DEFENDANTS), RES-
PONDENTS.*

1904.

February 22.

Civil Procedure Code (Act XIV of 1882), section 257 A.—Decree—Satisfaction—Sanction of the Court—Hindu Law—Father's debts—Son's liability to pay.

The plaintiff obtained a decree against N. for Rs. 350. In satisfaction of this decree, N. and his son A., who were living as members of a joint Hindu family, passed two bonds, the one for Rs. 251 and the other for Rs. 99. Both the bonds provided for the payment of interest and no sanction of the Court was obtained to this arrangement :

Held, (1) that the whole agreement was void, as the provision regarding interest carried the sum beyond the decretal amount. The consideration for each bond was the payment of principal with interest, and it existed from the very commencement and formed the basis of the whole contract ;

(2) that the bonds were void against N. as well as against A., since N and his son A. being members of a joint Hindu family the son was as much liable as his father under the decree.

PER CURIAM :—" The true test, it appears to us, of the application of section 257 A is—is it a judgment-debt as to the person executing the agreement, in the sense that it is binding upon him as if he were bound by the decree."

Under Hindu Law the pious obligation of a son to pay his father's debts exists whether the father is living or dead. The mere fact that a father is alive when the decree against him is sought to be executed does not absolve the son from his liability and entitle him to say that satisfaction of the decree shall not be obtained by selling his interest in the family property. When, however, the decretal debt is tainted by illegality or immorality, the son can contend that the decree is not binding upon him and establish the contention in a separate suit.

SECOND APPEAL from the decision of H. S. Phadnis, Assistant Judge at Thána, confirming the decree passed by G. K. Kale, Joint Subordinate Judge at Mahád.

The plaintiff obtained a decree for Rs. 350 against one Narayan in Suit No. 1463 of 1886. On the 3rd March, 1887, Narayan and his son Anandrao, who were living as members of a joint Hindu family, satisfied this decree by passing two mortgage-bonds, one for Rs. 251 and the other for Rs. 99. The bonds provided

1904.
 GOYIND
 v.
 SAKHARAM.

for interest. No sanction of the Court under section 257A of the Civil Procedure Code (Act XIV of 1882) was taken to this arrangement.

In 1902, the plaintiff sued on one of the bonds (for Rs. 99), and claimed to recover the amount with interest.

The defendants contended that the bond was void inasmuch as no sanction of the Court was taken under section 257A of the Civil Procedure Code (Act XIV of 1882).

The lower Courts dismissed the suit holding that the bond sued upon was void under section 257A of the Civil Procedure Code (Act XIV of 1882).

The plaintiff appealed to the High Court.

S. S. Patkar, for the appellant:—Anandrao, one of the executors of the mortgage-deed sued upon, was not a party to the decree and therefore the bond is not void under section 257A of the Civil Procedure Code (Act XIV of 1882): see *Kesu v. Genu* ⁽¹⁾; *Harackhand v. Totaram* ⁽²⁾; *Ramji Pandu v. Mahomed Walli* ⁽³⁾; *Yella Chetti v. Munisami Reddi* ⁽⁴⁾; *Ramji v. Mahomed* ⁽⁵⁾; *Adveppa v. Ahmed Saheb*. ⁽⁶⁾ The object of section 257A is to protect judgment-debtors from undue pressure. Anandrao not being a judgment-debtor, the bond is enforceable at least against Anandrao. Clause 3 of the section, "the surplus if any shall be recoverable by the judgment-debtor," shows that the section applies only to persons who are judgment-debtors. The bond though jointly passed by Anandrao and Narayan is for the purposes of the suit joint and several: section 43 of the Indian Contract Act (IX of 1872). The bond is therefore enforceable against Anandrao. Secondly, the agreement to pay the principal in the bond in suit is separable from the agreement to pay interest and therefore section 257A would not vitiate the agreement to pay the principal: *Bhagehand v. Radhakisan*. ⁽⁷⁾

P. P. Khare, for the respondent:—Anandrao lived jointly with his father and therefore the bond is void under section 257A.

(1) (1898) 23 Bom. 502.

(2) (1889) P. J. p. 377.

(3) (1889) 13 Bom. 671.

(4) (1882) 6 Mad. 101.

(5) (1889) P. J. p. 90.

(6) (1891) P. J. p. 40.

(7) (1903) 28 Bom. 62; 5 Bom. L. R. 672.

of the Civil Procedure Code (Act XIV of 1882). There cannot be contribution between Anandrao and his father. Secondly, a decree against the father is binding against the son unless the debt is proved to be for illegal and immoral purpose; and therefore section 257A would apply to a bond passed by the son. The agreement to pay the principal is not separable from the agreement to pay interest. The bond is not enforceable even against Anandrao.

S. S. Patkar, in reply :—Under section 43 of the Indian Contract Act (IX of 1872), a joint bond is joint and several. The rule in *King v. Hoare* ⁽¹⁾ and *Kendall v. Hamilton* ⁽²⁾ is no longer applicable in India : *Muhammad Askari v. Radhe Ram Singh* ⁽³⁾; *Motilal Bechardass v. Ghellabhai Hariram* ⁽⁴⁾; *Dick v. Dhunji Jaitha*. ⁽⁵⁾ Section 257A of the Civil Procedure Code (Act XIV of 1882) must be strictly construed. It applies only to persons who are parties to the decree. Anandrao not being a party to the decree the bond is enforceable against him. It has been held in *Harakchand v. Totaram* ⁽⁶⁾ that whether the son was or was not a co-parcener with his father at Hindu Law, he not being a party to the suit against the father, the bond on which the suit is brought is not void under section 257A of the Civil Procedure Code (Act XIV of 1882). The bond is therefore enforceable against Anandrao.

CHANDAVARKAR, J.:—This second appeal arises out of a suit brought by the appellant, Govind Krishna Gujar, to recover a certain amount on a mortgage-deed executed on the 2nd of March, 1887, by Narayan Bhivrao and his son Anandrao. Both the executants of the deed having died, the suit was brought against Sakharam and Sitaram, sons of the deceased Narayan, and against Chandri, widow of the deceased Anandrao. The execution of the deed and its consideration, and the circumstances which led to its execution were admitted by the defendants at the trial before the Subordinate Judge in whose Court the suit was filed and

(1) (1844) 13 M. and W. 494.

(2) (1879) 4 App. Cas. 504.

(3) (1900) 22 All. 397.

(4) (1892) 17 Bom. 6 at p. 11.

(5) (1901) 25 Bom. 378; 3 Bom. L. R. 234.

(6) (1889) P. J. p. 377.

1904.

GOVIND
2.
SAKHARAM.

1904.

GOVIND
v.
SARHARAM.

the only question argued in this second appeal is whether the deed is void under the second clause of section 257A of the Code of Civil Procedure.

That question arises under the following circumstances.

The appellant, Govind Krishna Gujar, obtained a decree against Narayan for Rs. 350. In satisfaction of that decree both Narayan and his son Anandrao executed two bonds, one of which is the mortgage deed now in dispute, and is for Rs. 99, and the other is for Rs. 251. No sanction of the Court was obtained for such satisfaction, and as the mortgage deed provided for the payment of interest, both the Courts below have held that it falls within the class of transactions struck at by the second paragraph of section 257A of the Code of Civil Procedure.

It was urged before us that the deed in question was not wholly void but void only as to the agreement contained in it to pay interest; that it was valid as to the amount of the principal mentioned in it, which was not in excess of but was less than the decretal amount. But we think that the promise to pay the principal and the promise to pay future interest thereon are part and parcel of one and the same agreement and cannot be separated one from the other. The decision in *Bhagchand v. Radhakisan Mohanlal* ⁽¹⁾ which was cited in support of his contention by the learned pleader for the appellant turned upon the construction of a bond, where there were two distinct agreements, by one of which the executant promised to pay in satisfaction of a decree obtained against him a sum which was not in excess of the decretal amount within three months from the date of the bond; by the other agreement in the bond he promised to pay interest if the principal should remain unpaid within the three months. Under those circumstances this Court held that the agreement to pay interest was *conditional* and did not form part of the other absolute agreement to pay the principal within three months. Such is not the case here. The consideration for the bond is the payment of the principal with interest and that consideration existed from the very commencement. As it formed the basis of the whole contract, it cannot be said that the agreement to pay interest stands apart

(1) (1903) 28 Bom. 62; 5 Bom. L. R. 672.

sc as to be separable from the agreement to repay the principal. There was in fact no agreement to repay the principal alone.

But the more important question in the case is whether the deed is void not only as against Narayan, against whom the decree had been obtained, but also as against his son, Anandrao, who joined in the execution of the deed. We will first consider the case as if Narayan and Anandrao were not father and son and members of a joint Hindu family. Had Anandrao executed the deed without Narayan joining him, the deed would have been perfectly valid and stood unaffected by the second paragraph of section 257A, according to the decision of this Court in *Kesu v. Genu*.⁽¹⁾ Does the fact, then, that Anandrao joined Narayan in the execution of the deed make any difference as to his liability? We do not think it does. According to section 43 of the Contract Act, "when two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one or more of such joint promisors to perform the whole of the promise." There is no express agreement in the deed before us binding the mortgagee to enforce the mortgage against both the executants of the mortgage deed jointly and not severally and we must take it that the mortgagee is entitled to treat at his option their liabilities as several or joint. In other words, having regard to section 43 of the Contract Act, we must treat the deed before us as containing an agreement binding on Anandrao and creating a liability against him and as containing another agreement by Narayan creating a separate liability as against him. The deed is void as to the latter but valid as to the former. Because a deed is void as to one of the parties, it does not necessarily follow that it is void as to the rest. For instance, when two persons, one of whom is *sui juris* and the other a minor, contract a debt and execute a bond, it does not follow that because the bond is void as against the minor, it is void as against the other person also.

The process of reasoning on this point by which the Assistant Judge, Mr. Phadnis, agreeing with the Subordinate Judge, has held the deed to be void as to both the executants, is not quite intelligible. He thinks that the decision in *Kesu v. Genu*⁽¹⁾

1904.

GOVIND

v.

SAKHARAM.

(1) (1898) 23 Bom. 502.

1904.

GOVIND
v.
SAKHARAM.

is inapplicable here, because "in this bond there is not even a single expression or clause to indicate or suggest that either of the executants undertook any several liability irrespective of the other." The deed before us is perfectly clear. Narayan and Anandrao jointly promised to pay the amount and mortgaged their property. In such a case, the Contract Act says that it is at the option of the mortgagee to treat the liability as several, unless there is any express agreement between the parties to treat the liability as joint and joint only. The argument of the Assistant Judge that if the mortgagee were allowed to enforce the deed as against one of the executants, it would "necessitate qualifying the rule about contribution which is so absolutely and peremptorily worded in the section" appears to us to be altogether beside the question. Had Anandrao executed a separate bond in satisfaction of Narayan's debt, and had the decree-holder of Narayan enforced payment from Anandrao under the bond, there is no question Anandrao could have sued to recover the amount from Narayan as for money paid for the latter. What difference can it make in point of law because Anandrao has not executed a separate agreement but has joined Narayan in executing one? The question of contribution arises between Anandrao and Narayan and is apart from what is struck at by the provisions of section 257A of the Civil Procedure Code.

But it is further urged—and that is also the reasoning of the Assistant Judge—that as Anandrao was Narayan's son and as both formed members of a joint family, it must be inferred that Anandrao was a judgment-debtor in the decree obtained against Narayan. This raises the question whether Anandrao can be regarded as having been a party to the suit as his father Narayan was. For the purposes of that question we must bear in mind the facts found in this case by the learned Assistant Judge—*viz.*, that both the father and the son were joint, and that the decretal debt of Rs. 350, which subsequently merged in the mortgage deed for Rs. 99 and the bond for Rs. 251, being not tainted either by illegality or immorality, was binding on the son, Anandrao. It follows from these facts that after he had obtained his decree against Narayan, the present plaintiff could have executed it

against both by bringing to sale the interest of Anandrao as well as of Narayan in the family property. Anandrao could have, in that case, objected to the sale by a separate suit but in such a suit he would have been defeated and it would have been held that the decretal debt was binding upon him, and that his interest in the family property was as much liable to satisfy the decree as his father's. In other words, where a decree is obtained against a Hindu father in a joint family for a debt which it is the pious obligation, according to Hindu law, of his son who is joint with him, to pay, the son is also liable for the purposes of the execution of the decree against the family property. In this state of things he is in fact regarded in law as a party to the decree, though his name is not formally on the record. This is the principle to be gathered from the reasoning of the decision of the Privy Council in *Girdharee Lall v. Kantoo Lall* ⁽¹⁾ where their Lordships said:—"If the decree was a proper one, the interest of the sons, as well as the interest of the fathers, in the property, although it was ancestral, were liable for the payment of the father's debts." That is also the principle of the decisions of this Court in *Umed Hathising v. Goman Bhaiji* ⁽²⁾ and *Jagabhai Lalubhai v. Bhukandas Jagjivandas*. ⁽³⁾ In the former, following the latter, Sargent, C. J., held that "it being distinctly established by the Privy Council's decisions that the creditor can attach and sell the entirety of the estate in execution of a money decree against the father," the obligation of the son to satisfy his father's debts "is within the scope of the decree against the father." No doubt in each of these two cases the father against whom the decree had been obtained was dead when execution was sought against the sons; but the ground of the decision in each case is what we must look to, and that ground was that, if the decretal debt is not tainted by illegality or immorality, the sons are within the scope of the decree and it can be executed as to them as if they were parties to it. The law is now well established that under the Hindu law, the pious obligation of a son to pay his father's debts exists whether the father is alive or dead. The mere fact that the father is

1904.

GOVIND

v.

SAKHARAM.

⁽¹⁾ (1874) 1 I. A. 321 at p. 334.⁽²⁾ (1895) 20 Bom. 335 at p. 338.⁽³⁾ (1886) 11 Bom. 37.

1904.

GOVIND
v.
SAKHARAM.

alive when the decree against him is sought to be executed does not absolve the son from his liability and entitle him to say that satisfaction of the decree shall not be obtained by selling his interest in the family property. The son can no doubt contend that the decree is not binding upon him and seek to establish that contention in a separate suit. But such a separate suit is allowed only on the hypothesis that the decretal debt is tainted by illegality or immorality and is, therefore, not binding upon him. But if it is otherwise, the suit fails and its failure means that he is bound by the decree. This view is in accordance also with the decision of the Madras High Court in *Kunhali Beari v. Keshava Shanbaga* ⁽¹⁾, where the decision of this Court in *Jayabhai v. Bhukandas* ⁽²⁾ was cited with approval as "an authority for the view that, as between the father and son, the father is the representative of his branch of the family, that, as against the son, he has a disposing power in regard to the share of the family property belonging to that branch, and that the son can only invalidate the sale in execution by showing that it was on account of an obligation to which he was not subject under Hindu law." In that case it was further said:—"As to the contention that the son was not a party to the suit or the decree, the answer is, all the sons can claim is that not being parties to the sale or execution proceedings, they ought not to be debarred from trying the fact or the nature of the debt in a suit of their own, and it will avail them nothing unless they can prove that the debt was not such as to justify the sale."⁽³⁾

From these considerations we think it follows that, though the decree obtained by the present plaintiff which led to the execution of the mortgage deed in dispute was *formally* against Narayan alone, his son Anandrao must be treated as if he was a party to it, having regard to the fact that the decretal debt was binding upon him and that the decree could have been executed by a sale of the whole family property including his right, title, and interest. If, then, Anandrao was substantially, though not formally, a party to the decree, the mortgage deed executed by him required the sanction of the Court under the second para-

⁽¹⁾ (1887) 11 Mad. 64 at p. 68.

⁽²⁾ (1886) 11 Bom. 37.

⁽³⁾ (1887) *Ibid* p. 76.

graph of section 257A of the Code of Civil Procedure. The object of that section, as was said by this Court in *Bank of Bengal v. Vyabhoy Gangji* ⁽¹⁾, was "to afford some protection to the parties against unfair arrangements," and "that object will be adequately ensured by holding that such agreements cannot be enforced unless made with the sanction of the Court." That being the mischief which the Legislature intended to strike at and the true reason of the remedy provided, we must construe the section in such a way as shall suppress the mischief and advance the remedy. Persons who have nothing to do with a decree, who are not affected by it and are in no way bound by it, cannot fall within the mischief struck at by the section. But the same consideration cannot apply where a person is substantially bound by the decree, though not *pro forma* a party to it. In his case, there is as much the fear of being subjected to illegal pressure as there is in the case of the person who is the judgment-debtor named in the decree. In the case of a total stranger to the decree, who enters into an agreement for the satisfaction of a judgment debt, due from another person, the agreement cannot be said to be one in satisfaction of "a judgment debt." As to such stranger, it is a contractual liability not merged in a decree. The true test, it appears to us, of the application of section 257A is—is it a judgment debt as to the person executing the agreement in the sense that it is binding upon him as if he were bound by the decree? In an ordinary case, where A and B are jointly indebted to C, and C obtains a decree against and enforces payment of the whole debt from A alone, the decree is not *under any circumstances* binding upon B; and C cannot execute the decree by bringing to sale B's property. Moreover, if A has satisfied the decree, he can seek contribution from B. But if A and B happen to be father and son in a joint Hindu family, the legal consequences of the decree are different, provided the decretal debt is of a nature binding, according to Hindu law, on the son. In such a case if C execute the decree against A alone, A cannot seek contribution from B; if C execute the decree against the interest of B in the family property, B cannot seek contribution from his father A—and

1964.

GOVIND

v.
SAKHARAM.

(1) (1891) 16 Bom. 618 at p. 625.

1904.

GOVIND
v.
SAKHARAM.

that because it is not a joint debt of the father and the son in the ordinary sense—but a debt giving rise to a liability specially created by the Hindu law, according to which, while union continues, one coparcener cannot claim contribution from another in respect of a single payment. In other words, the moment there is a decree against the father for a debt not tainted by illegality or immorality, there is “a judgment debt” binding on the son also and it is none the less “a judgment debt” because the law of procedure allows the son to question the binding character of the debt in a separate suit. Judged by this test, the mortgage bond in dispute must be held to be void as against Anandrao also, as no sanction of the Court was obtained. As against this view, Mr. Patkar has cited *Harakchand v. Totaram* ⁽¹⁾, where Jardine and Candy, JJ., held that “whether the son was or was not a coparcener with his father at Hindu law, he not being a party to the suit against his father, the bond on which the present suit is brought is not void under section 257A.” That decision has not gone into the authorized reports and it merely follows, as is explicitly stated in the judgment, the decisions in *Ramji v. Mahomed Walli* ⁽²⁾ and *Yella Chetti v. Munisami Reddi*. ⁽³⁾ But on examination of these two latter cases we find that they do not support the decision in *Harakchand v. Totaram*. ⁽¹⁾ Both in *Ramji v. Mahomed Walli* ⁽²⁾ and *Yella Chetti v. Munisami Reddi* ⁽³⁾ the father and the son were Mahomedans, there was no question about a coparcenary and all that was held was that section 257A applied only to parties to the decree. The decision in *Harakchand v. Totaram* ⁽¹⁾ being based on a misapprehension of the decisions which it follows, we are not bound by it. We confirm the decree with costs.

Decree confirmed.

⁽¹⁾ (1889) P. J. p. 377.

⁽²⁾ (1889) 13 Bom. 671.

⁽³⁾ (1882) 6 Mad. 101.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

NARAYAN VITHAL MAWAL (ORIGINAL DEFENDANT), APPELLANT,
v. RAOJI BIN MOROJI DHOLE (ORIGINAL PLAINTIFF), RESPONDENT.*

1904.

February 25.

*Decree—Execution—Claim of interest not provided by the
decree—Acquiescence.*

A mortgage decree ordered payment of Rs. 1,415-10-6 before March, 1886, but contained no provision as to interest. In execution of this decree the defendant presented several applications (*darkhasts*), the last of which was in 1893, whereby he sought to recover Rs. 2,570-4-5 as principal and interest and in default to have the amount realized by sale of the property. On the 2nd March, and again on the 7th August, 1900, the judgment-debtor got the sale postponed saying that he would satisfy the decree. On the 12th October, 1900, the plaintiff again asked for extension of time to enable him to pay the debt and interest also. On the 29th July and the 17th August, the plaintiff obtained further extensions, but was not able to satisfy the decree. At last, on the 20th September, 1902, he (plaintiff) for the first time disputed the right of the defendant to claim interest on the ground that the decree did not award any :—

PER CURIAM:—The plaintiff's application of the 12th October, 1900, contained a distinct promise to pay interest rightly or wrongly he represented to the Court that he was liable to pay interest as claimed in the *darkhast*, promised to pay it, and on the strength of that representation and promise he obtained from the Court adjournments from time to time. He must be treated as having contracted an obligation to pay interest on the decretal amount from the 12th October, 1900.

SECOND APPEAL from the decision of A. Lucas, District Judge of Poona, reversing the order passed by P. V. Gupte, First Class Subordinate Judge at Poona.

The defendant obtained in 1886 a decree in a redemption suit against the plaintiff. The decree awarded to the defendant Rs. 1,415-10-6 and in default the property was to be sold. There was no provision about interest in the decree.

In execution of this decree the defendant presented several *darkhasts* (applications), the last having been presented in 1893. In this application the defendant sought to recover Rs. 2,570-4-5 as principal and interest; and he prayed that in default of payment the property might be sold and the amount realized,

* Second Appeal No. 533 of 1903.

1904.

NARAYAN
v.
RAOJI.

On the 2nd March, 1900, the plaintiff asked for and obtained a postponement of the sale for six months to enable him to pay the debt. On the 7th August, 1900, the plaintiff obtained from the Court sanction to execute a mortgage or *kabulayat* to the creditor.

On the 12th October, 1900, the plaintiff again obtained extension of time so that he might pay the debt as well as the interest. On the 29th July, 1901, the plaintiff succeeded in obtaining from the Court an extension for three months. And on the 17th August, 1901, the plaintiff asked the Court for sanction to mortgage the property to satisfy the decree. The Court granted the prayer but the plaintiff was not able to satisfy the decree as proposed by him.

Finally, on the 20th September, 1902, the plaintiff for the first time disputed the right of the defendant to claim interest on the ground that the decree made no provision for interest.

The Subordinate Judge rejected the plaintiff's application holding that the conduct and admission of the plaintiff estopped him from raising the issue about interest.

The District Judge on appeal reversed this order on the ground that under the circumstances there could be no agreement binding on the plaintiff, and it cannot be said that the agreement was sanctioned by the Court.

The defendant appealed to the High Court.

G. S. Rao, for the appellant (defendant) :—We contend in the first place that the appellate decree varied only the rate of interest prior to the date of suit and did not modify the decree of the Subordinate Judge as regards payment of interest till the date of payment. Even if it be held that the decree of the Appellate Court did not award interest till date of payment, then as the judgment-debtor did not question the amount claimed by the appellant in his *darkhast* it must be held that he accepted his liability to pay interest although it was not allowed by the decree. In his application dated the 12th October, 1900, the judgment-debtor made an application to the Court that the decree awarded interest and that he was willing to pay the amount claimed in the *darkhast* and prayed for six months' time to pay the debt. In subsequent applications he prayed to the

same effect. Thus the judgment-debtor having agreed to pay interest is bound to make good his promise: see *Sadasiva Pillai v. Ramalinga Pillai*⁽¹⁾, followed in *Lakshmana v. Sukiyu Bai*.⁽²⁾

Next, the judgment-debtor having induced the judgment-creditor to agree to an adjournment is now estopped from saying that the decree did not award interest from payment: see *Sarat Chunder Dey v. Gopal Chunder Laha*.⁽³⁾

Kazi Kabiruddin (with *P. P. Khare*), for the respondent:—The decree of the Appellate Court awarded only a definite sum and did not award any interest subsequent to the date of the decree. So when the creditor claimed, and the judgment-debtor did not object, or agreed to pay interest till payment, both parties were labouring under a mistake of fact and the agreement is therefore void: see section 20 of the Indian Contract Act (IX of 1872).

As the judgment-creditor himself shared in the mistake about the terms of the decree it cannot be said that the creditor was induced to consent to the adjournment by the admission of the defendant in his application and the principle of estoppel therefore will not apply to the present case. And in the words of the Privy Council where the truth of the matter appears on the face of the record the doctrine of estoppel has no application: *Tara Lal Singh v. Sarobar Singh*⁽⁴⁾. We therefore contend that the plaintiff's prayer for interest should be disallowed.

CHANDAVARKAR, J.:—The question of law which arises in this case depends upon certain facts which are not disputed and are as follows.

On the 15th January, 1885, a decree was passed in a redemption suit directing the plaintiff to pay Rs. 1,868-1-10 and interest at 8 annas per cent. per month from the date of the suit till realization on Rs. 1,331-11-4.

Against that decision there was an appeal and the Appellate Court varied the decree by awarding to the plaintiff Rs. 1,415-10-6 to be paid before the month of March (1886-87) and in default the property was to be sold.

(1) (1875) 2 I. A. 219.

(2) (1884) 7 Mad. 409.

(3) (1892) 20 Cal. 296.

(4) (1899) 27 Cal. 407, at p. 413.

1904.

NARAYAN
v.
RAOJI.

The defendant presented several *darkhasts*. The present is his last *darkhast*, whereby he seeks to recover Rs. 2,570-4-5, which is the sum total of the principal and interest which he claims as having been awarded to him by the decision of the District Court: and he also asks that in default of payment of the sum the property might be sold and the amount realized.

On the 2nd March, 1900, after the presentation of the above *darkhast*, the plaintiff asked the Court to postpone the sale for six months promising to pay the debt within six months. The defendant consented and an adjournment was granted. On the 7th August, 1900, the plaintiff appeared before the Court and pleaded inability and asked for sanction to execute a mortgage or a *kabulayat* in favour of the creditor. The Court granted the prayer.

On the 12th October, 1900, the plaintiff again appeared before the Court and asked for further extension of time to enable him to pay the debt and interest also.

On the 29th July, 1901, the plaintiff asked for a further extension of six months and the Court granted him three months. On the 17th August, 1901, the plaintiff asked the Court for sanction to mortgage the property and satisfy the decree, and the Court granted one month. The plaintiff, however, was not able to satisfy the decree as he had proposed. On the 29th September, 1902, for the first time he disputed the right of the defendant to claim interest on the ground that the decree of the Appellate Court did not award any.

There is no doubt that that decree is silent as to interest and the defendant (appellant) cannot claim it, if his right depended upon the decree alone. But it is contended for him by Mr. Rao that, having regard to the plaintiff's conduct, disclosed by his applications presented to the Subordinate Judge, the plaintiff is estopped from disputing the defendant's right to claim interest. But the difficulty in applying the principle of estoppel to the facts of the case lies in this, that it cannot be said, that it was the plaintiff's act or declaration that he is liable to pay interest according to the terms of the decree, which caused the defendant to believe that the decree had awarded interest. Before any act was done or declaration made to that

104.
NARAYAN
v.
RAOJI.

effect by the plaintiff, the defendant himself had in his *darkhast* presented to the Court asserted his right to claim interest, believing that the decree had awarded it. Under these circumstances it cannot be said that the statement of the plaintiff that he was liable to pay interest was the proximate cause which led the defendant into the mistaken belief that the decree awarded interest. Moreover, both parties must be treated as having known the terms of the decree which were clear, and "there can be no estoppel when the truth of the matter appears, as it does in the present case, on the face of the proceeding": see the dicta of the Privy Council in *Tara Lal Singh v. Sarbar Singh*.⁽¹⁾ As has been held by the Privy Council, section 115 of the Evidence Act does not apply where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement: *Mohori Bibee v. Dhurmodas Ghose*.⁽²⁾

But though the plaintiff is not strictly speaking estopped, his application of the 12th October, 1900, contained a distinct promise to pay interest. No doubt that promise was founded on his erroneous belief that under the decree he was liable, but, whether rightly or wrongly, he represented to the Court that he was liable to pay interest as claimed in the *darkhast*, he promised to pay it, and on the strength of that representation and promise he obtained from the Court adjournments from time to time. He must, under these circumstances, be treated as having contracted an obligation to pay interest on the decretal amount from the 12th October, 1900. Had he then disputed the defendant's right to interest, the defendant would have objected to any adjournment being granted and insisted upon his right to bring the mortgaged property to sale at once and realize the decretal amount. The defendant did not object, because the plaintiff agreed to pay interest.

The case, therefore, falls within the principle of the decision of the Privy Council in *Sadasiv Pillai v. Ramalinga Pillai* ⁽³⁾ where the parties were held to an agreement that the questions between them should be heard and determined by proceedings quite contrary to the ordinary *cursus curiæ*. That decision was

(1) (1899) 27 Cal. p. 413.

(2) (1903) 30 I. A. 114 at p. 122.

(3) (1875) 2 I. A. p. 233.

1901.

NARAYAN

P.
RAOJI.

followed by the Madras High Court in *Lakshmana v. Sukiya Bai*.⁽¹⁾

Relying upon this last decision Mr. Rao asks us to award interest as claimed by the defendant in his *darkhast* because, he urges, the plaintiff agreed to pay interest *as claimed in the darkhast*. No doubt the plaintiff did so agree. But his agreement to pay interest on the principal sum awarded by the decree from the date of the decree was founded upon his mistaken belief that he was already liable under the decree to pay it. That mistake was also shared by the defendant. So far the contract was vitiated by the mutual mistake of both the parties as to the terms of the decree. It was a mistake as to the private rights of the parties and as such a mistake of fact (see Leake on Contracts, page 288). The contract was, therefore, void because it was entered into under a mistake as to a matter of fact essential to the agreement. True both parties knew the terms of the decree, but both misconstrued it. Under these circumstances the defendant cannot claim interest except so far as he has really suffered from the plaintiff's mistake. All that the defendant can legally claim is that the contract being void for a mistake of fact, the plaintiff, who has received advantage under such agreement, is bound to make compensation for it to the defendant: see sections 65 and 73 of the Contract Act. Had the defendant insisted on his right to execute the decree, the plaintiff's property would have been sold and the decretal debt realized. By means of the agreement the plaintiff kept the defendant out of his money and has had himself the advantage of it. He must, therefore, pay interest at the rate claimed in the *darkhast* from the 13th October, 1900, up to the date of payment and not from any earlier period. In *Lakshmana v. Sukiya Bai* ⁽¹⁾ the agreement was not void for any mistake of the parties but was entered into deliberately as an agreement to pay interest not awarded by the decree.

(1) (1884) 7 Mad. 400.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

JETHABHAI PARBHUDAS AND ANOTHER (ORIGINAL PLAINTIFFS),
APPELLANTS, v. NATHABHAI BAVAJI AND OTHERS (ORIGINAL DEFEND-
ANTS), RESPONDENTS.*

1904.
March 8.

Bhagdari and Narwadari Act (Bombay Act V of 1862), sections 3, 5†—Bhag—Narwa—Recognized sub-divisions of a Narwa compromise effecting a sub-division not recognized—Void compromise—Collector's action—Appeal to Commissioner—Civil Court—Adverse possession—Evidence Act (I of 1872), section 115—Estoppel.

At the death of K, a sub-sharer holding a recognized sub-division in a *narwa*, disputes arose between plaintiffs and defendants as to the heirship. The disputes

* Second Appeal No. 484 of 1903.

† Sections 3 and 5 of the Bhagdari and Narwadari Act run as follows :—

3. It shall not be lawful to alienate, assign, mortgage, or otherwise charge or incumber any portion of any bhag or share in any bhagdari or narwadari village other than a recognized sub-division of such bhag or share, or to alienate, assign, mortgage or otherwise charge or incumber any homestead, building-site (gabhan) or premises appurtenant or appendant to any such bhag or share or recognized sub-division appurtenant or appendant thereto, apart or separately from any such bhag or share, or recognized sub-division thereof.

Any alienation, assignment, mortgage, charge or incumbrance, contrary to the provisions of this section, shall be null and void ; and it shall be lawful for the Collector or other chief revenue-officer of the district, whenever he shall, upon due inquiry, find that any person or persons is or are in possession of any portion of any bhag or share of any homestead, building-site (gabhan) or premises appurtenant or appendant to such bhag or share in any bhagdari or narwadari village other than a recognized sub-division of such bhag or share, in violation of any of the provisions of this section, summarily to remove him or them from such possession, and to restore the possession to the person or persons whom the Collector shall deem to be entitled thereto ;

and any suit brought to try the validity of any order or orders which the Collector may make in such matter must be brought within three months after the execution of such order or orders.

* * * * *
5. Nothing in this Act contained shall be construed as prohibiting the alienation, assignment, mortgaging, charging or incumbering any bhag or share, or recognized sub-division of any bhag or share, in any such village as aforesaid, conjointly and in the gross with its homestead, building-site (gabhan) and other proper appurtenances, if such alienation, assignment, mortgage, charge or incumbrance be in other respects warranted by law, the object and intention of this Act being to prevent the dismemberment of bhags or shares, or recognized sub-divisions thereof, in bhagdari or narwadari villages, and also to prevent the severance of homesteads, building-sites (gabhan) or other premises, appurtenant or appendant to bhags or shares, or recognized sub-divisions of bhags or shares, from the same or any of them.

1904.

JETHABHAI
v.
NATHABHAI.

led to a suit by the plaintiffs, wherein they failed. Before, however, the period for appeal expired, the parties effected an amicable settlement, by which the defendants gave up their rights in favour of the plaintiffs over half of a survey number, which was a part of a *narwa* holding governed by the Bhagdari and Narwadari Act (Bombay Act V of 1862). Later on the plaintiffs leased their portion of the land in perpetuity to a third party. The defendants thereupon applied to the Collector, complaining that the plaintiffs had alienated the property contrary to the provisions of the Bhagdari and Narwadari Act (Bombay Act V of 1862), and praying that the alienation being void, they (the defendants) should be placed in possession of the land. The Collector declined to interfere; but, on appeal, the Commissioner held otherwise and directed the defendants to be put in possession of the land. The plaintiffs then filed a suit to recover the possession of the land.

Held, that as the effect of the compromise arrived at between the parties was to alienate a portion of a *bhag* or share in a *narwa* other than a recognized sub-division of such *bhag* or share it was void within the meaning of section 5 of the Bhagdari and Narwadari Act (Bombay Act V of 1862); that the plaintiffs acquired no rights under the compromise, and that therefore they were not entitled to any relief.

An appeal from an order passed by the Collector under section 3 of the Bhagdari and Narwadari Act (Bombay Act V of 1862) lies to the Commissioner.

The Collector can take action at any time under section 3 of the Bhagdari and Narwadari Act (Bombay Act V of 1862); and the plea of adverse possession cannot prevail against any order that he may make.

Dala v. Parag Khushal (1) followed.

It is of the essence of the title by adverse possession that it must relate to some property which is recognized by law.

SECOND APPEAL from the decision of S. L. Batchelor, District Judge of Ahmedabad, confirming the decree passed by J. M. Shukla, Subordinate Judge of Borsad.

Suit to recover possession of land.

The property in dispute belonged originally to one Kashibhai, who was a sub-sharer holding a recognized sub-division in a *narwa* under the Bhagdari and Narwadari Act (Bombay Act V of 1862). Kashibhai died leaving a widow; and on her death, the plaintiffs inherited the property as heirs of Kashibhai. Disputes then arose between the plaintiffs and the defendants' father as to the heirship; and they resulted in Suit No. 1783 of 1882 being filed by the plaintiffs. On the 20th December, 1882, this suit was decided against the plaintiffs. Before the period of

(1) (1902) 4 Bom. L. R. 797.

1904.

JETHABHAI
v.
NATHABHAI.

appeal had expired, the plaintiffs and defendants' father entered into a compromise on the 21st January, 1884, the effect of which was that the defendants waived their right over the properties described in the compromise including one half of survey No. 275 and passed a release for it to the plaintiffs, who were since then in possession of the properties mentioned in the compromise. The plaintiffs on the 14th June, 1895, leased the property in perpetuity to Ambaidas and Govindbhai. This action of the plaintiffs led the defendants to apply on the 31st January, 1896, to the Collector under the Bhagdari and Narwadari Act (Bombay Act V of 1862), complaining that the lease by the plaintiffs would dismember the *narwa* and praying that the property should be given up to them. In June, 1896, the Collector decided that the permanent lease would not cause a dismemberment of the *narwa* and that the defendants had no cause or right to complain. This decision was, on appeal, reversed by the Commissioner; and the defendants were put in possession of the property in July, 1898. In 1901, the plaintiffs filed this suit to recover the possession of the property from the defendants.

The defendants contended (*inter alia*) that the claim was barred by the provisions of Bhagdari and Narwadari Act (Bombay Act V of 1862), and that the compromise dated the 21st January, 1884, was inoperative.

The Subordinate Judge threw out the plaintiffs' claim holding that the jurisdiction of the Civil Court was barred by the Bhagdari and Narwadari Act (Bombay Act V of 1862). On appeal this decree was confirmed by the District Judge.

The plaintiffs appealed to the High Court.

L. A. Shah, for the appellants (plaintiffs):—We submit that the release (Exhibit 44) is not an alienation or an assignment within the meaning of section 3 of the Bombay Act V of 1862. It is only a compromise between the rival claimants of Kashibhai's property and the rights of inheritance are in no way included within the scope of section 3 of the Act: see *Veribhai v. Raghobhai*.⁽¹⁾ Further the land in dispute is one of the many properties mentioned in Exhibit 44; and there is nothing to show that all the said properties including the land in dispute do not form a recognized

(1) (1876) 1 Bom. 225.

1904.

JETHABHAI
v.
NATHABHAI.

sub-division of a *narwa*. The lower Courts have not approached the question from that point of view. Before the release could be declared to be inoperative under section 3 of the Bhagdari and Narwadari Act (Bombay Act V of 1862) the Court has to see whether or not all the properties including the disputed land and not only the land in dispute mentioned in Exhibit 44 formed part of a *narwa* or of a recognized sub-division thereof. The lower Appellate Court is wrong in holding the claim barred by the concluding portion of section 3 of the Act.

The Collector has made no order in this case and the Commissioner is not the officer within the meaning of the section. The Act does not provide for any appeal to the Commissioner. And for the purposes of the section the Commissioner has no *locus standi* whatever. The suit is not therefore barred.

We have also made out a claim by adverse possession.

[ASTON, J.:—Could the provisions of the Bhagdari and Narwadari Act (Bombay Act V of 1862) be controlled by the plea of adverse possession under the Limitation Act (XV of 1877): see *Dala v. Parag Khushal* ⁽¹⁾ ?]

We submit that though the Collector is at liberty to take action at any time under section 3 of the Act, the Courts have to give effect to the legal rights as much under the Limitation Act (XV of 1877) as under the Bhagdari and Narwadari Act (Bombay Act V of 1862). The case of *Dala v. Parag Khushal* ⁽¹⁾ relates only to the Collector's order.

We further submit that the defendants are estopped from going behind the compromise (section 115 of the Indian Evidence Act, I of 1872).

At any rate, the land in dispute should be joined up with Kashibhai's land and therefore given over to the plaintiffs; but the defendants are in no way entitled to it: see *Mahamad Dasu v. Amanji*. ⁽²⁾

M. N. Mehta, for the respondents (defendants):—The land in dispute is a portion of a survey number, which stands in the name of defendant No. 1; and being portion of a *narwa* has been rightly joined up with the remaining portion of the survey num-

(1) (1902) 4 Bom. L. R. 797.

(2) (1899) 23 Bom. 710.

ber. Exhibit 44 is an alienation within the meaning of section 3 of the Bhagdari and Narwadari Act (Bombay Act V of 1862), since it conveys the property absolutely to the plaintiffs. The land in dispute being a portion of a *narwa* the compromise does constitute dismemberment of it and is therefore void.

The plea of adverse possession cannot affect the application of the Act: see *Dala v. Parag Khushal*.⁽¹⁾ The Courts can do what the Collector can do under the section at any time.

Section 115 of the Indian Evidence Act (I of 1872) does not apply and the facts in this case do not create any estoppel.

L. A. Shah was heard in reply.

CHANDAVARKAR, J.:—The undisputed facts of this case, which have given rise to several questions of law, are shortly these. Kasibhai was a sub-sharer, holding a recognised sub-division in a *narwa*. He died leaving a widow, and the plaintiffs allege that on her death they inherited the property as heirs of Kasibhai. There were disputes between the plaintiffs and the defendants' father as to heirship and that led to Suit No. 1783 of 1882. In that suit the plaintiffs failed and before the period for appeal expired, the parties effected an amicable settlement, which resulted in the execution of a deed dated the 21st of January, 1884, (Exhibit 44) by which the defendants' father gave up all his rights in favour of the plaintiffs in certain properties which comprised the land in dispute. That land is a portion of Survey No. 275 and is 2 acres and 4 gunthas in extent, the whole of the survey number being 4 acres and 8 gunthas. This survey number is a *Narwa* holding and Bombay Act V of 1862 applies to it.

The plaintiffs leased the land in dispute in perpetuity to third parties and that led the defendants to make an application to the Collector, complaining that the plaintiffs had alienated the property contrary to the provisions of the Act just mentioned. They alleged that the permanent tenancy was an alienation of an unrecognized portion of the *narwa*, and requested the Collector to declare it void and place them in possession of the land. The Collector, however, declined to interfere on the ground that the permanent lease did not amount to any dismemberment or the

1904.

JETHABHAI

vs.
NATHABHAI.

(1) (1902) 4 Bom. L. R. 797.

1904.

JETTABHAI
v.
NATHABHAI.

creation of an unrecognized sub-division of the *narwa* holding and that there had been a recognized sub-division by virtue of Exhibit 44 before the permanent lease. The defendant appealed from the Collector's order to the Revenue Commissioner who reversed that order and directed the defendants to be put in possession of the land in dispute.

The present suit was brought by the plaintiffs to recover possession. Both the Courts below have rejected the plaintiffs' claim and in this second appeal their pleader has urged their title to recover the land on three grounds: (1) that their title being derived from Exhibit 44, which is a deed of compromise, there was no alienation within the meaning of section 5 of Bombay Act V of 1862; (2) that they have become owners by adverse possession; and (3) that the defendants are estopped from denying the validity of Exhibit 44 and contesting the plaintiffs' title to the land.

At the outset it is to be remarked that the question of the validity or otherwise of the permanent lease and of the Commissioner's order thereon is not before us. Neither party contests the legal propriety of that order. The first question is—whether Exhibit 44 had the effect of alienating a portion of a *bhag* or share in the *narwa* other than a recognized sub-division of such *bhag* or share and was on that account void within the meaning of section 5 of Bombay Act V of 1862?

It is argued for the plaintiffs that Exhibit 44 is not affected by that section, because it is urged, it was a compromise entered into for the settlement of a *bond fide* dispute between the parties. The answer to that, however, is that the result of the compromise was to dismember Survey No. 275, which comprised 4 acres and 8 gunthas, and to give to the plaintiffs 2 acres and 4 gunthas out of it. In other words, by Exhibit 44 was carved out of the *narwa* a sub-division which did not exist at the date of the transaction as “a recognized sub-division.” Whether we call it a compromise or a partition or by any other name, the effect of the transaction was the same. The substance and effect of the transaction is what must be looked to for the purpose of determining whether it is within the mischief which the Legislature had in view in passing the Act in question. If the

1904.

JETHABHAI
v.
NATHABHAI.

transaction clearly amounts to an alienation of an unrecognised sub-division of a share in a *narwa*, its real nature cannot be disguised by calling it a compromise. The relinquishment, then, by the defendants' father of the land in dispute in favour of the plaintiffs was not lawful but void under the provisions of sections 3 and 5 of Bombay Act V of 1862. But it was argued that although the transaction was void under Bombay Act V of 1862, yet in the absence of interference on the part of the Collector, there was nothing to prevent Civil Courts from recognising the rights of the plaintiffs. We cannot give effect to this argument, because section 3 declares that such an alienation as we have here "shall not be lawful," which means that it shall be absolutely void. The plaintiffs sue in ejectment and must make out their title to recover the land. Their title rests on Exhibit 44, but that being a void deed there is nothing on which the plaintiffs' title can rest. Whether the Collector interferes or not under the second clause of section 3, the first clause making such alienations "not lawful," a Court of law is bound to give effect to it. Further, the action of the Commissioner in putting the defendants in possession was under the power given to the Collector by the second clause of section 3. It is true that the action was taken on the defendants' complaint as to the permanent lease. But the defendants asked to be put in possession and the Collector had relied in his order on the fact that in his opinion Exhibit 44 represented a valid transaction. With these facts before him the Commissioner reversed the Collector's order and restored the possession to the defendants. Even assuming that the Commissioner had not the question of the validity of Exhibit 44 before him, we are bound to uphold his action if we can ascribe it to something which he had the legal power to do, the question being not whether the Commissioner intended to restore possession to the defendants because he thought Exhibit 44 to be void, but rather whether the defendants can defend the possession so obtained on legal grounds. Next it is contended that the Commissioner had no jurisdiction to interfere under the Act, because the authority designated in section 3 is the Collector, and the Act gives no appeal from the Collector's order to the Commissioner. The answer to that is that Bombay Act V of 1862 must be read with the Land Revenue Code. Section

1904.

JETHABHAI

v.

NATHABHAI.

203 of the Land Revenue Code lays down: "In the absence of any express provision of this Act, or of any law for the time being in force to the contrary, an appeal shall lie from any decision or order passed by a Revenue-officer under this Act, or any other law for the time being in force, to that officer's immediate superior, whether such decision or order may itself have been passed on appeal from a subordinate officer's decision or order or not." The Collector is 'a Revenue-officer' according to the definition of the term in the Code, and it is conceded by the learned pleaders for both parties that for the purpose of assessment a *narwa* tenure falls within the provisions of the Land Revenue Code. The Commissioner, therefore, had jurisdiction to interfere with the order of the Collector passed under Bombay Act V of 1862.

Now, we come to the question of the title said to have been acquired by the plaintiffs by adverse possession. The District Judge has found the plaintiffs' possession for more than twelve years under Exhibit 41 proved, but he has held that it is not adverse, because some of the defendants were minors during the period. We need not consider the legal soundness of that view of the District Judge, because, in our opinion, Bombay Act V of 1862 is not affected by the Limitation Act, as was decided in *Dala v. Parag Khushal*,⁽¹⁾ where it was held that the Collector can, under section 3 of the Bhagdári Act, take action at any time, and that the plea of adverse possession cannot prevail against any order that he may make. Then again in *The Collector of Broach v. Desai Raghunath*,⁽²⁾ it was held that no law of limitation applies to proceedings taken by a Collector under Bombay Act V of 1862.

If, as we have already held, the Commissioner's order supplies the place of the Collector's order and is passed with jurisdiction, then this case falls within the principles laid down in the cases cited above. Apart from authority and on principle alone it seems to us that such a title as the plaintiffs claim to have acquired cannot be acquired by adverse possession. It is not the case of the plaintiffs that they have held the land in dispute adversely for more than twelve years as a land not falling within

(1) (1902) 4 Bom. L. R. 797.

(2) (1883) 7 Bom. 540.

the *narwa* tenure or the specific *narwa* holding of which it admittedly forms a part. Their case rather is that they have held it as forming part of the holding and as subject to all the incidents of the tenure. All that is claimed for them is that their possession for more than twelve years of the land in dispute entitles them to hold it as against the defendants as "a recognized sub-divison" of a *dhag* or share in the *narwa*. But it is of the essence of a title by adverse possession that it must relate to some property, which is recognized by law. But here there is no such property, since the Legislature has proscribed the kind of property on which the plaintiffs seek to found their title by adverse possession.

Then as to estoppel. Apart from the question whether section 115 of the Indian Evidence Act was intended to apply to transactions expressly declared by the Legislature to be void or unlawful, the undisputed facts of the case are such as to make that section inapplicable. The plaintiffs were about to appeal from the decree passed in the suit which they had brought, and in consideration of their not appealing, the defendants' father relinquished his rights to the land in dispute. In other words, the plaintiffs' promise not to appeal formed the consideration for the relinquishment. It was substantially a contract between the parties. There was no declaration, act or omission by means of which the defendants' father led the plaintiffs to believe a thing to be true and to act upon such belief. Section 115 of the Evidence Act requires that to create an estoppel there must be a representation by means of a declaration, act or omission that *a thing is true, i.e.*, that the representation is "as to some state of facts alleged to be at the time actually in existence." If the representation relates to promises *de futuro*, it can be binding not as an estoppel but as a contract: see per Selborne L. C. in *Maddison v. Alderson*,⁽¹⁾ and per Lord Macnaghten in *George Whitechurch Limited v. Cavanagh*.⁽²⁾ Assuming that there was a representation as to an existing state of facts, what was it that the defendants' father can be said to have represented to be true? That the plaintiffs were the heirs entitled to the land in dispute. The defendants do not dispute that—in fact, they are

1904.

JETHABHAI
v.
NATHABHAI.

(1) (1883) 8 App. Cas. p. 473.

(2) (1902) A. C. 117 at p. 130.

1904.

JETHABHAI
v.
NATHABHAI.

not concerned to dispute it for the purposes of the present case. The defendants' father did not represent that the land in dispute was a recognised sub-division of a *bhāg* or share in the *narwa* which could be legally held whether, by the plaintiffs or any one else, and that is the question which is now in dispute. If the plaintiffs agreed to the compromise in Exhibit 44 under the belief that the land was a recognised sub-division, that belief was not caused by the defendants' father. In fact, there is no allegation, much less evidence, to show that the defendants' father caused the plaintiffs to act upon that belief.

For these reasons we confirm the decree of the lower Appellate Court with costs.

Decree confirmed.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

1904.

March 9.

NARAYAN AND OTHERS (ORIGINAL APPLICANTS), APPELLANTS, v. VEN-KATACHARYA BALKRISHNACHARYA (ORIGINAL OPPONENT), RESPONDENT.*

Hindu Law—Mitākshara—Debts—Surety—Grandson's liability to pay debts contracted by the grandfather as a surety.

Under Hindu Law as laid down in the *Mitākshara* a grandson is not liable to pay a debt which his grandfather contracted as a surety unless the latter in accepting the liability of a surety received some consideration for it.

A party is not bound, generally speaking, by a pleader's admission in argument on what is a pure question of law amounting to no more than his view that the question is unarguable.

SECOND APPEAL from the decision of J. C. Gloster, District Judge of Belgaum, confirming the decree passed by D. S. Sapre, Subordinate Judge of Athni.

Application for the removal of attachment under a decree.

The opponents obtained a decree against the assets of one Ramchandra, the grandfather of the applicants. The decree was for the recovery of a debt due by Ramchandra as a mere surety for the payment of money. In execution of this decree

* Second Appeal No. 547 of 1903.

the opponents attached the property of Ramchandra in the hands of his grandsons (the applicants). This attachment the applicants prayed to remove, on the ground that the property was not liable to be attached and sold in execution of the decree as it had been obtained for the recovery of a debt due by their deceased grandfather Ramchandra as a mere surety.

The Subordinate Judge found that the property in dispute which was joint family property in the hands of grandsons was liable for the payment of the debt of their grandfather due by him as surety for the payment of money. His reasons were as follows:—

“At the outset I may observe that most of the commentators on Hindu Law are against the view that grandsons are liable to pay the debts of their grandfather due by him as a mere surety for the payment of money (see Mandlik's *Vyavahar Mayukha*, pp. 107, 108). But it may be observed that the liability imposed by the texts of Hindu Law on the son or grandson to pay the debt of his father or grandfather is a personal liability, irrespective of the existence of assets (see I. L. R., 19 All. 29). In the present case there are admittedly certain joint family assets in existence, and I therefore venture to think that mere texts of Hindu Law are of no material use here; most of the writers on Hindu Law deny the grandson's liability for interest on a debt due by his grandfather. But this liability has been clearly established by a recent decision of the Allahabad High Court (see I. L. R., 19 All. 26). Several of the writers on Hindu Law also deny the son's liability for interest due on a debt contracted by his father as surety, but I do not think that this liability can be questioned now (see I. L. R., 23 Bom. 454). It appears to have been firmly established by recent judicial decision that the son is liable to pay every debt of his father that is not tainted with immorality or illegality. The same principle applies to the case of the grandson (see I. L. R., 19 All. 31). The debt in suit is admittedly not tainted with illegality or immorality, and I think that it is such as grandsons would be liable to pay to the extent of the joint family assets in their hands. At p. 459 of I. L. R., 23 Bom., Mr. Justice Ranade cites it as the opinion of the commentator, Kulluka, that in the case of a surety for the payment of money his heirs even may be compelled to discharge the debt. Mr. Justice Ranade appears to have cited this opinion of Kulluka with approval, and I think it should be accepted. There can be no doubt that the term ‘heirs’ includes grandsons, and so the above opinion of Kulluka is applicable to this case.”

On appeal the District Judge confirmed this decree.
The applicants appealed to the High Court.

1904.

NARAYAN
v.
VENKATA-
CHARYA.

G. K. Parekh, for the appellants :—A grandson is not liable to pay the debts of his grandfather incurred as a surety: see *Mandlik's Vyavhar Mayukha*, pp. 107 and 108.

K. H. Kelkar, for the respondent :—The appellant is not entitled to raise this question here as his pleader has abandoned it in the District Court. It is admitted that the self-acquired property of the grandfather is liable for such a debt. If so, the character of the property was a matter in issue in the case; and the pleader having abandoned the point as to liability it cannot be raised here: see *Raja Bommadevara Venkata v. Raja Bommadevara Bhashyakarl*.⁽¹⁾

Further, we submit that a grandson is, according to the authorities, liable when he is in possession of assets. Both the *Mitākshara* and the *Mayukha* recognize the liability of a grandson when the surety was for a consideration. This must be read with the general rule of Hindu Law which associates the liability with the possession of assets: see Manu, chapter VIII, pl. 160; Sir William Macnaghten's *Precedents of Hindu Law*, p. 285; Vishnu (Jolly), chapter VI, pl. 29. The *Mitākshara* in discussing the liability of sons, etc., has in view the liability of the sons, etc., *independently of the possession of the assets*. He who takes the property must pay the debts is a rule affirmed by the *Mitākshara*. The appellants here are liable for the debts because they possess the assets of the deceased: see also *Tukarambhat v. Gangaram*⁽²⁾; *Lachman Das v. Khunnu Lal*⁽³⁾; Colebrooke's Digest, chapter IV, p. 159; Brihaspati, chapter XI, pl. 39 *et seq.*

G. K. Parekh, in reply :—There was no abandonment of any point in the lower Court. Even if abandoned a vakil does not bind his client by giving in on any question purely of law. Assets mean self-acquired property of the father. Ancestral property in the hands of the father going into the possession of the sons is not liable for the payment of the father's debt contracted for immoral purposes. Security debt is a debt of the same kind. Consideration means consideration obtained from the person on whose

(1) (1902) 29 I. A. 76.

(2) (1898) 23 Bom. 454.

(3) (1896) 19 All. 26 at p. 31.

behalf he becomes surety. Where there is no conflict among commentators, the *Smritis* cannot be referred to in order to show that the commentators' versions are not in accordance with them : see *Suraj Bansi Koer v. Sheo Proshad Singh*.⁽¹⁾

1904.

NARAYAN
v.
VENKATA-
CHARYA.

CHANDAVARKAR, J.:—The question in this second appeal is simple of solution, though it has given rise to a somewhat lengthy argument at the Bar. A money decree was passed on the 15th of September, 1902, in favour of the respondent against such estate of the deceased Ramchandra Narayan as might be in the possession of his grandsons who are the appellants before us. That decree is now sought to be executed against the ancestral estate which has come into the hands of the appellants who formed as to it members of an undivided family with their grandfather Ramchandra. The appellants resist the execution on the ground that the decretal debt is one for which they are not liable under the Hindu law, as it was a debt contracted by their grandfather as a surety. We think this contention must be allowed. The law as laid down in the *Mitakshara*, by which the parties are governed, is that a grandson is not liable to pay a debt which his grandfather contracted as a surety unless the latter in accepting the liability of a surety received some consideration for it. It was not the case of the respondent in the Courts below that the suretyship here belonged to the class falling within the exception. The decree itself which is now sought to be executed proceeds on the basis that the debt was in respect of the suretyship accepted by Ramchandra; had it been one for which Ramchandra had received consideration the respondent would have, as he should have, pleaded that in the first Court and led evidence. He has done neither, and we cannot allow the contention. The next question is—whether, the only property which the appellants hold being the joint family property of their deceased grandfather and themselves, that property is answerable for the decretal debt in the hands of the appellants. We think it is not. Joint family property is liable in the hands of sons and grandsons only for debts which they are bound by Hindu law to pay.

It was contended before us by Mr. Kelkar for the respondent that it was not open to the appellants to raise the point as to

1904.

NARAYAN
v.
VENKATA-
CHARYA.

their liability, because they had abandoned it in the lower Appellate Court. The point was no doubt abandoned by their pleader in that Court, as appears from its judgment, where it is said:—"Mr Ajrekar for appellants does not now dispute the general liability of grandsons for such a debt as that on which the original suit was based, and it is therefore unnecessary to consider further the numerous authorities cited by the respondent's pleader in support of the conclusion arrived at by the Subordinate Judge."

We understand that to mean no more than that the pleader on his view of the law thought that the point was unarguable. A party is not bound, generally speaking, by a pleader's admission in argument on what is a pure question of law amounting to no more than his view that the question is unarguable. The decision of the Privy Council in *Raja Bomma-devara Venkata v. Raja Bommadevara Bhaskyukarl*,⁽¹⁾ cited by Mr. Kelkar, turned on a different state of facts. The pleader for a party there waived the point of limitation on which evidence was being led and which turned on a question of fact. After such waiver the party could not raise the point as the waiver amounted to an admission of a fact.

We must reverse the order and reject the *darkhast*. Each party to bear his own costs throughout.

Decree reversed.

(1) (1902) 29 I. A. 76.

CRIMINAL APPELLATE.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

EMPEROR v. KONDIBA DHONDIBA POWAR AND OTHERS.*

1904.

March 15.

Criminal Procedure Code (Act V of 1898), sections 303, 304—Judge—Jury—Misunderstanding the law—Verdict mistaken or ambiguous—Powers of the Judge to question the jury.

Section 304 of the Criminal Procedure Code (Act V of 1898) obviously contemplates cases where the verdict delivered is not in accordance with what was really intended by the jury. It has no application where there is no

* Criminal Appeals Nos. 29, 30 and 77 of 1904.

accident or mistake in the delivery of the verdict; and the mistake lies in the misunderstanding of the law by the jury. If such a mistake results in an erroneous verdict, it can be corrected only by the Judge disagreeing with the jury and referring the case under section 307 of the Code to the High Court.

PER CURIAM.—"There is no provision in the Code of Criminal Procedure (Act V of 1898) which empowers the Judge to question the jury as to their reasons for a unanimous verdict when there is nothing ambiguous in the verdict itself, and no lurking uncertainty in the minds of the jury themselves regarding it. Section 303 of the Code limits the power of the Judge to question to cases in which it is necessary to ascertain what the verdict of the jury is—that is, where the verdict being delivered in ambiguous terms or with uncertain sound their meaning is not clear."

APPEALS from convictions and sentences passed by A. Lucas, Sessions Judge of Poona.

The accused were charged with counterfeiting Queen's Coin, and having in their possession implements and materials for the purpose of counterfeiting Queen's Coin, offences punishable under sections 232 and 235 of the Indian Penal Code (Act XLV of 1860). They were tried by the Sessions Judge with a jury. After the case was summed up by the Judge to the jury, the latter returned a unanimous verdict of guilty under section 235, part 2, of the Indian Penal Code (Act XLV of 1860) and a unanimous verdict of not guilty under section 232 in respect of all the accused. With the latter part of the verdict the Judge did not agree; and he therefore put the following question to the jury.

Question.—May I ask your reasons for holding that the accused are not guilty under section 232?

Answer.—The accused were not actually caught in the act of coining.

What followed then was thus recorded by the Sessions Judge. "The commentary of section 232 (which had already been read to the jury by the Public Prosecutor when summing up the case) is again read to the jury, as it appears to me probable that their verdict of 'not guilty' under section 232 is the result of a mistake, and the jury are asked to retire and reconsider their verdict in the light of the commentary on section 232. In my heads of charge I told the jury that if they believed the evidence for the

1904.

EMPEROR
v.
KONDIBA

1904.

EMPEROR
v.
KONDIBA.

prosecution they should find the accused guilty of both offences. I did not again read out the commentary on section 232, because the Public Prosecutor had read it but a very short time before. After retiring for some time the foreman states that the jury were under a mistake and that they had not properly understood the commentary on section 232; he states that the verdict of the jury now is that all of the accused are also guilty of an offence under section 232 of the Indian Penal Code."

The Sessions Judge then agreed with the verdict and sentenced each of the accused to undergo rigorous imprisonment for five years.

The accused appealed to the High Court.

The *Government Pleader* for the Crown.

No one appeared on behalf of the accused.

PER CURIAM:—In this case the accused were tried before the Sessions Judge of Poona and a jury on charges under sections 232 and 235 of the Indian Penal Code. The jury returned a unanimous verdict of guilty under section 235, and a unanimous verdict of not guilty under section 232 in respect of all the accused. The learned Judge thereupon questioned the jury as to their reasons for holding that the accused were not guilty under section 232. The jury answered that the accused had not been actually caught in the act of coining. The learned Judge then explained to them the law under section 232 and asked them to reconsider their verdict. Upon this the jury returned a unanimous verdict of guilty under section 232.

The ground upon which the Judge asked the jury to reconsider the verdict was, as explained in the record of the case, that it appeared to him that the first verdict of "not guilty" was the result of mistake. No doubt section 304, Criminal Procedure Code, provides that "when by accident or mistake a wrong verdict is delivered, the jury may, before or immediately after it is recorded, amend the verdict." But that section obviously contemplates cases where the verdict delivered is not in accordance with what was really intended by the jury. Here there was no accident or mistake in the delivery of the verdict, for the jury having arrived at the conclusion that the accused were not guilty gave the verdict in accordance with it. The mistake

was in their misunderstanding the law under section 232. If such mistake has resulted in an erroneous verdict, it can be corrected only by the Judge disagreeing with the jury and referring the case under section 307 of the Criminal Procedure Code to the High Court. There is no provision in the Code which empowers the Judge to question the jury as to their reasons for a unanimous verdict when there is nothing ambiguous in the verdict itself and no lurking uncertainty in the minds of the jury themselves regarding it. Section 303 limits the power of the Judge to question to cases in which it is necessary to ascertain what the verdict of the jury is—that is, where the verdict being delivered in ambiguous terms or with uncertain sound their meaning is not clear. In the present case there was no ambiguity in the unanimous verdict of “not guilty” and the only course left for the Judge, if he disagreed with it, was to record it and act under section 307 of the Criminal Procedure Code. This view is in accordance with the decisions of this Court in *Empress v. Bharmia*,⁽¹⁾ and *Queen-Empress v. Madhavrao*.⁽²⁾ In the former it was held that “the questions actually put to the jury demanding their reasons for acquitting of the charge of murder, on which charge the jury had delivered an unanimous verdict without any uncertain sound, exceeded the limits of questioning which the law contemplates”: see also the remarks of Phear, J., in *Queen v. Sustiram Mandal*.⁽³⁾

Though for these reasons we think the procedure of the Judge was irregular, we are of opinion that it has not led to a miscarriage of justice and we do not see any reason to interfere with the sentence of 5 years’ rigorous imprisonment passed on the accused, as it could have been passed under the Indian Penal Code for the conviction under section 235 of the Indian Penal Code. We confirm the convictions and sentences and dismiss the appeals.

(1) (1895) 6 Bom. L. R. 258 at p. 261.

(2) (1894) 19 Bom. 735.

(3) (1873) 21 W. R. L. (Cri. Ral.).

1904.

EMPEROR

v.
KONDIBA.

APPELLATE CIVIL.

*Before Mr. Justice Crowe and Mr. Justice Chandavarkar.*1904
*April 7.*GOVIND VALAD DHOND PATIL (JUDGMENT-CREDITOR), v. DADA
VALAD UDAJI PATIL (JUDGMENT-DEBTOR).**Limitation Act (XV of 1877), schedule II, article 179, clause 5—Decree—
Execution—Application for execution—Civil Procedure Code (Act XIV of
1882), section 248—Notice—Date of the order.*

The date of issuing a notice under section 248 of the Civil Procedure Code (Act XIV of 1882) is the date on which the Court orders that it should issue, and not the date on which the notice is formally drawn up afterwards and signed. The limitation therefore under article 179, clause 5, of the second schedule to the Limitation Act (XV of 1877) runs from the former date.

REFERENCE by J. D. Dixit, Subordinate Judge of Sinnár in the Násik District, under section 617 of the Civil Procedure Code (Act XIV of 1882).

The facts in the reference, the question referred and the reasons for the opinion of the Subordinate Judge appear from the reference, which was as follows :—

“The present darkhast was filed by the decree-holder Govind Dhond Patil on the 11th January, 1904, for the execution of the decree in Civil Suit No. 474 of 1902 by attachment and sale of moveable property. The last darkhast was filed on the 15th December, 1900, and the present darkhast having been filed more than three years from the date of the last is barred under clause 4 of article 179 of the second schedule of the Limitation Act, unless it comes within clause 5 to the said article. In the previous darkhast an order for issuing notice under section 248 of the Civil Procedure Code was made on the 15th December, 1900, *i.e.*, the day on which the darkhast was filed. The process fee for the notice was paid on the 10th of January, 1900, and the notice was prepared and was ready on the 12th January, 1901. If the date of issuing the notice be held to be the date on which the order was passed the darkhast is clearly barred; but if the date of issuing the notice be considered to be the date on which it was actually prepared, the darkhast would be in time. Many other similar darkhasts have been filed in this Court and would

* Civil Reference No. 1 of 1904.

be barred if the date of the order be held to be the date of issuing the notice. The darkhast is a Small Cause darkhast and my decision in it is final. The point besides is one of general occurrence, and as I entertain doubts as to the correct view of the law, for the reasons which I propose to give below, I humbly and respectfully beg to refer the following question for the decision of the Hon'ble the Chief Justice and Judges of His Majesty's High Court :—

“(1) Whether for the purposes of clause 5 of article 179 of the second schedule of the Limitation Act ‘the date of issuing a notice under the Code of Civil Procedure, section 248,’ means the date on which the order for the issue of the notice was passed or the date on which the notice was actually prepared and issued by the proper authority of the Court? My opinion on the point is that the date on which the notice is ready and signed by the proper authority of the Court is the date referred to in clause 5.

“The ground of my opinion is based on the plain grammatical meaning of the words ‘the date of issuing a notice.’ The whole of clause 5 is as follows :—‘(where the notice next hereinafter mentioned has been issued) the date of issuing a notice.’ The clause is only applicable in cases where a notice has actually issued. It does not save limitation if only an order is made for the issuing of a notice. The making of the order and the issuing of a notice are not identical acts. Issuing means something more. Before a notice is issued the decree-holder must pay the necessary process fee. Under High Court Civil Circular No. 120, page 70, before any process is *issued* in any Court, the proper officer of the Court has to calculate the amount to be paid as Court fees and to give information of it to the person by whom the fees are payable. Then again there is a limit of time prescribed by the same rule within which the person applying for the process has the right to pay it. No process can be issued unless an order is made in the first instance for its issue. The circular makes the issue of the process quite distinct from the order. Without, therefore, doing violence to the language of clause 5, the date of issuing cannot be considered to be the date of the order. For if the legislature had intended to count the

1904.

GOVIND

C.
DADA.

1904.
 GOVIND
 v.
 DADA.

period from the date of the order, they would have said so in so many words. There is again no reason why the word 'issued' where it first occurs in clause 5 should be construed differently from the word 'issuing' occurring thereafter. The word 'issued' has been construed as referring to the actual issuing of a notice and not to the order made for the purposes of the issue of the notice (*Hari Ganesh v. Yamunabai* ⁽¹⁾ and *Damodar v. Sonaji*.) ⁽²⁾ The ruling in *Koong Beharee's* case ⁽³⁾ given at page 399 of O'Kinealy's notes on the Civil Procedure Code (5th edition) is to the effect that limitation runs from the date on which the notice was issued and served. This is a ruling under the old Code. Not only this but the remarks in the Bombay cases cited above and the cases relied on therein have created grave doubts in my mind as to whether the date of issuing a notice is to be considered the date of the order for its issue. There is no positive ruling one way or the other so far as I am aware, but the remarks in the cases cited above, though perhaps *obiter dicta* on the point in question deserve great weight. I am informed that the practice of this Court was to count the periods of limitation from the date on which the notice was prepared and issued, but since the ruling in the case of *Damodar v. Sonaji* ⁽²⁾ referred to above it seems to have been disturbed. The point is thus one of considerable importance and I have ventured to bring it to their Lordships' notice. The remarks which seem to have caused the disturbance in the practice are these: 'In our opinion actual service is not necessary. But where notice has issued, time runs from the date of the order directing the same under section 248, Civil Procedure Code' (*Damodar v. Sonaji* ⁽⁴⁾). The point had not directly arisen in the case for their Lordships' decision. The only point there being whether serving of the notice was necessary. Then again in the case of *Hari Ganesh v. Yamunabai* ⁽¹⁾ Parsons, J., has observed at page 38 of the report 'as no notice was ever issued, time cannot here be counted from the date of the order of the Court though it may be that when an order has been issued, the date of its *issue* would be the date, on which the Court ordered its issue, as was ruled by the Allahabad

(1) (1897) 23 Bom. 35.

(2) (1903) 27 Bom. 622.

(3) (1874) 22 W. R. 434 (Civ. Rul.).

(4) (1903) 27 Bom. p. 625.

High Court in the case quoted from the Weekly Notes by the lower Court.' Here again the question, raised at present, was not directly before the Court. The only point was whether a notice ought to issue. The construction placed on the first word 'issued' was the actual issuing of the notice. But it would appear from the *obiter dictum* that the construction put on the word 'issuing' following the word 'issued' is different. This has enhanced my doubt. It would be inconvenient to construe clause 5 as above, for generally orders directing issue of notice under section 248 are made on the day the darkhast is filed and clause 5 of article 179 of the second schedule would be a dead-letter in such cases, notwithstanding that the decree-holder took the further troubles of paying the process fee and getting a notice. Statutes of limitation being in restriction of the natural right of subjects ought to be construed strictly and in favour of the right of the public."

J. R. Gharpure, (amicus curiæ), for the judgment-creditor:—We submit that the date of issue is the date on which the notice was ready for being despatched. The case of *Damodar v. Sonaji*⁽¹⁾ does not apply here. In that case notice was issued and the question was whether time should run from the date of the order or of its actual service upon the opponent. There it is assumed that notice was *issued*. If it is issued then the decision should apply. We submit the *issuing* of a notice contemplates two stages—(1) the order of the Court for its *issue*, and (2) its actual *issue* from the office after payment of process fee, etc. Moreover, article 179 (5) of schedule II of the Limitation Act (XV of 1877) has no application to such a case. Notice must be issued and the mere order of a Court that a notice should issue, which, in fact, is not issued is not sufficient: see *Hari Ganesh v. Yamunabai*.⁽²⁾ By comparing the wording and spirit of clause (1) of the same article and rulings thereon, it will be seen that the order must be one that is capable of being executed: see *Dildar Hossein v. Mujeeddunnissa* ⁽³⁾; *Mahabir Prasad v. Sital Singh*.⁽⁴⁾

D. W. Pilgaumkar, (amicus curiæ), for the judgment-debtor:—The point referred is decided in *Damodar v. Sonaji*⁽¹⁾; *Udit*

⁽¹⁾ (1903) 27 Bom. 622

⁽²⁾ (1897) 23 Bom. 35,

⁽³⁾ (1878) 4 Cal. 629.

⁽⁴⁾ (1897) 19 All. 520.

1904.

GOVIND

C.
DADA.

Narain v. Ram Pertab Singh ⁽¹⁾; and *Baldeo v. Harrison*.⁽²⁾ In the last case the meaning of the word 'issue' is defined. Preparing and signing an order is embodying the order under the seal of the Court, just as preparing and signing the decree is embodying an adjudicating order under the seal of the Court. Decree is prepared some days after the judgment is delivered, but it bears the date on which the judgment is pronounced; and limitation runs from the date on which the judgment is pronounced, and not from the date the decree is ready.

CHANDAVARKAR, J.:—The notice must be taken to be issued when the Court orders that it should issue, the order of the Court being itself the issue of the notice, though owing to the exigencies of business the notice has to be formally drawn up afterwards and signed and then despatched. These subsequent acts are all mere matters of routine following as a matter of course the first act of the Court which consists in judicially ordering under section 248 the issue of the notice. The judicial pronouncement that there shall be notice is itself the issuing, just in the same way that there is a decree made, not when it is drawn up and the Judge signs it, but the moment it is pronounced by the Judge in Court. This view is in accordance with the decision of this Court in *Damodar Shaligram v. Sonaji*.⁽³⁾

(1) (1881) Allahabad Weekly Notes, 120.

(3) (1903) 27 Bom. 622, 5 Bom. L. R.

(2) (1890) *Ibid*, 245.

594.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

1904.

January 20.

DAGDU VALAD JAIRAM AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS,
v. BHANA VALAD JAIRAM AND OTHERS (ORIGINAL DEFENDANTS),
RESPONDENTS.*

Contract—Proposal with unqualified assent—Mistake in expression—Common mistake—Unilateral mistake—Evidence Act (1 of 1872), section 92, proviso 1—Contracting party not able to read—Contract differing from that pretended to be read.

It is of the essence of a contract that there should be (expressly or by implication) a proposal to which an unqualified assent has been given: without

* Second Appeal No. 73 of 1903.

such assent there is no contract : the minds of the contracting parties are not at one.

Mistake in expression may be either common or unilateral.

Mistake in expression implies that the minds of the parties are not at one on that which is expressed ; but it does not follow that in every case where there in fact has been such mistake there is no contract. Practical convenience dictates that men should be held to the external expression of their intentions, unless this be outweighed by other considerations : and to this legal effect is given by the law of evidence, which permits oral proof at variance with documents only in certain cases : in the rest the proof, if it be of mistake, is not received, so that the mistake does not come to light, and in a Court of law does not exist.

The Court, administering equitable principles, permits mistake to be proved when it is common : that is, where the expression of the contract is contrary to the concurrent intention of all the parties. If such mistake be established, then the Court can give the relief of rectification, but what is rectified is not the agreement, but the mistaken expression of it.

The general rule is that the intention of contracting parties is to be gathered from the words they have used. Where the mistake is unilateral, it does not ordinarily affect the rights which are the legitimate consequence of the words, though it may affect the remedy that will be awarded against the party in error.

But mistake known at the time to the other party may be proved and performance in accordance with the terms of the error will not be compelled.

A mistake even not known has legal consequences, provided there can be restoration of all parties concerned to their original position.

Where a contracting party, who cannot read, has a written contract falsely read over to him and the contract written differs from that pretended to be read, the signature on the document is of no force because he never intended to sign and therefore in contemplation of law did not sign the document on which the signature is.

If a person executes a document knowing its contents but misappreciates its legal effect, he cannot deny its execution.

SECOND APPEAL from the decision of F. X. DeSouza, District Judge of Khándesh, confirming the decree of V. R. Kulkarni, Subordinate Judge of Shirpur.

Certain lands originally belonged to one Mohan Fulsing, who had mortgaged them to Ramdas Gangadas for Rs. 1,000 with interest at 2 per cent. Subsequently defendant 1 purchased them from Mohan for Rs. 2,000 under a sale-deed dated the 5th September, 1894, subject to the mortgage lien of Ramdas, and on the 5th December, 1894, defendant 1 sold them to plaintiffs

1904.

DAGDU
v.
BHANA.

1904.

DAGDU

v.
BHANA.

for Rs. 2,800 under a sale-deed which contained the following covenant:—"If the said lands have been mortgaged or sold, etc., to anybody, I (defendant 1), am responsible for the same." After the purchase by plaintiffs, Ramdas brought a suit, No. 352 of 1896, upon his mortgage and obtained a decree for the recovery of the mortgage-debt by sale of the mortgaged property and in order to save the lands from being sold in satisfaction of the mortgage decree the plaintiffs paid to Ramdas Rs. 1,973-13-6. Thereupon in the year 1901 the plaintiffs brought the present suit against defendant 1 and his brothers for the recovery of Rs. 1,973-13-6 and interest thereon, namely, Rs. 201-2-6, in all Rs. 2,175, alleging that defendant 1 in his capacity as the manager of the undivided family consisting of himself and his two brothers had sold the lands to him and had agreed to be responsible for all previous burdens on the said lands.

Defendants 1 and 2 contended that they did not agree to pay the previous burdens on the lands, that the clause to that effect in the sale-deed was fraudulent and made without their knowledge and consent, and that supposing that the clause was genuine still they were not liable to plaintiffs' claim.

Defendant 3 was absent.

The Subordinate Judge found that it was not proved that defendant 1 undertook to pay the mortgage burden of Ramdas on the lands when he sold them to plaintiffs. He therefore dismissed the suit.

On appeal by the plaintiffs the Judge confirmed the decree. The following are extracts from his judgment:—

Plaintiffs' pleader relies on the express terms of the stipulation embodied in the sale-deed to show that it covered all previous subsisting encumbrances whether created by defendant 1 himself or his predecessor-in-title, Mohan Ful-sing, and he has argued that parol evidence varying or contradicting the clear terms of such an agreement is inadmissible under the provisions of section 92 of the Indian Evidence Act. It will be noted, however, that defendant 1 in his case has put forward a plea of mistake, misrepresentation and fraud and in such circumstances "Courts of equity are constantly in the habit of admitting parol evidence to qualify and correct and even to defeat the terms of written instruments." (Story, Equity Jurisprudence, Vol. 2, p. 750). If so, it is clear that parol evidence is admissible in the present case to show in what sense the terms of the covenant were understood by the parties, especially in view of the fact that defendant 1 is an illiterate agriculturist and the stipulation in question

is admittedly an interlineation and therefore presumably not forming part of the original draft document, but the result of an exchange of views between the parties on the spur of the moment.

1904.

DAGDU
v.
BHANA.

I, therefore, hold that what defendant 1 conveyed was his right, title and interest in the land with a guarantee probably against any encumbrances created by himself. The words in which that guarantee was expressed were unfortunate and plaintiffs have now fraudulently endeavoured to avoid themselves of their latitude and ambiguity to the detriment of defendants by bringing the present suit.

The plaintiffs preferred a second appeal.

Scott (Advocate-General) with *D. W. Pilgaumkar* appeared for the appellants (plaintiffs):—The covenant of indemnity contained in our sale-deed is unlimited in its terms. The Judge was of opinion that the covenant was the result of the exchange of views between the parties. He, therefore, held that it can be rectified on a consideration of the evidence showing the rectification. The defendants have not taken any steps to get the covenant rectified. So long as the covenant stands we are entitled to a decree. A party cannot be allowed to evade the provisions of section 92 of the Evidence Act.

Setlur (with *R. N. Inamdar*) appeared for the respondents (defendants):—We gave authority to the writer of the deed to insert an indemnity clause with reference to any incumbrance created by the vendor and not an unlimited covenant like the one in dispute. Further, the covenant in question is admittedly an interlineation. We alleged a case of mistake which is clearly covered by proviso (1) of section 92 of the Evidence Act. We found out our mistake after the present suit was brought and then we applied for its rectification. The mistake was a common mistake.

The covenant by itself is not clear as to the person creating a charge on the property. Therefore this is a case of latent ambiguity and we can clear up the ambiguity by oral evidence.

We could have brought a suit for the rectification of the covenant. We therefore submit that we can claim the same relief though we are defendants in the suit.

1904.

DAGDU

v.

BHANA.

Scott, in reply :—The plea in the written statement was that the covenant was a forgery and not a mistake. The Judge made out a new case by holding that it was a mistake.

JENKINS, C. J. :—This suit is to recover a sum of Rs. 1,973-13-0, with Rs. 201-2-6 as interest, for breach of a covenant against incumbrances contained in a conveyance of property by defendant No. 1 to plaintiff No. 3.

The property at one time belonged to Mohan Fulsing and his brothers, and was mortgaged to Ramdas Gangadas to secure Rs. 1,000 with interest.

On the 6th September, 1894, Mohan Fulsing and his brothers sold the property for Rs. 2,000 to defendant No. 1, who on the 5th December in the same year resold to the plaintiff No. 2 for Rs. 2,300.

In the conveyance executed on this sale there was a covenant by the 1st defendant in these terms: "If the said lands have been mortgaged or sold, etc., to any body, I am responsible for the same." Ramdas Gangadas in 1896 sued on his mortgage, and in satisfaction of his claim the plaintiff No. 2 paid Rs. 1,973-13-0. It is for this sum with interest that the plaintiffs now sue. The plea in the written statement is that the defendants 1 and 2 did not agree to pay the previous burdens on the land they sold to the plaintiffs, that the entry to that effect in the sale-deed was fraudulent and made without their knowledge and consent, and supposing the entry to be genuine, still the defendants are not liable to the plaintiffs' claim.

In the Court of the Subordinate Judge the suit was dismissed with costs. The plaintiffs appealed, and in the District Court the following issue was raised :—"Was the lower Court in error in holding that defendant 1 had not undertaken to pay off the previous incumbrances on the property to plaintiff 2?" It substantially agrees with the only issue raised in the first Court. We refer to it not as an aid towards the solution of this case (for it cannot be so regarded) but to make it the occasion for insisting on the importance of defining with precision at the outset the points on which a decision must turn. This no doubt requires thought and care, but the time is well spent; while vague and general

issues for the most part mean that the case is approached without a clear idea of its essentials.

The discussion before us has not proceeded on the lines of the written statement, but has been limited to the question whether the defendant No. 1 could or could not escape liability on the ground of mistake.

The mistake, if any, was in expression, and mistake of that sort may be either common or unilateral.

Mistake has been aptly described as merely a dramatic circumstance: and we think it will be found that the legal consequences associated with it are referable to the fundamental considerations, which lie at the root of all contractual obligation.

Speaking generally, it is of the essence of a contract that there should be (expressly or by implication) a proposal to which an unqualified assent has been given: without such assent there is no contract: the minds of the contracting parties are not at one.

Mistake in expression (it is of that class of mistake alone that we speak in this judgment) implies that the minds of the parties were not at one on that which is expressed: but it does not follow that in every case where there in fact has been such mistake, there is no contract. Practical convenience dictates that men should be held to the external expression of their intentions, unless this be outweighed by other considerations; and to this legal effect is given by the law of evidence, which permits oral proof at variance with documents only in certain cases: in the rest the proof, if it be of mistake, is not received, so that the mistake does not come to light and in a Court of law does not exist. We must therefore see where mistake can be brought to light, and what are the consequences that follow. Without tracing the stages by which the result has been reached, it will suffice to say that the Court in administering equitable principles permits mistake to be proved where it is common: that is where the expression of the contract is contrary to the concurrent intention of all the parties.

If such mistake be established, then the Court can give the relief of rectification, but be it noted, (as therein error often lurks) that what is rectified is not the agreement, but the mistaken expression of it.

1904.

DAGDU
v.
BHANA.

1904.

DAGDU
v.
BHANA.

Ordinarily this mistaken expression would be in the form of a document, and the existence of a real agreement prior to the document, is necessarily implied. The rectification consists in bringing the document into conformity with this prior agreement, and without such agreement there can be no rectification. It is an adjustment of the machinery to its proper end.

The position has been thus described in the argument in *Paget v. Marshall*⁽¹⁾ adopted by the Court, "if two persons contract, and they really agree to one thing, and set down in writing another thing, and afterwards execute a deed on that wrong footing, the Court will substitute the correct for the incorrect expression—in other words, will rectify the deed."

It is true that rectification is not claimed in this suit as a relief by the defendants, for the rules of procedure by which Mofussil Courts are governed do not permit of a counterclaim in this suit for that purpose, nor is there a cross suit for rectification: but as a Court guided by the principles of justice, equity and good conscience we can give effect as a plea to those facts, which in a suit brought for that purpose would entitle a plaintiff to rectification: cf. *Pife v. Clayton*⁽²⁾ and *Steele v. Haddock*.⁽³⁾

So much for common mistake: we must now see how matters stand when the mistake is unilateral.

The general rule, as we have indicated, is that the intention of the contracting parties is to be gathered from the words they have used, and a mistake by one ordinarily does not affect the rights, which are the legitimate consequence of the words, though it may affect the remedy that will be awarded against the party in error.

But mistake known at the time to the other party may be proved, and performance in accordance with the terms of the error will not be compelled: *Smith v. Hughes*.⁽⁴⁾

There are cases which go to show that mistake, even when not so known, has legal consequences, provided there can be restoration of all parties concerned to their original position. But it is needless at this stage to discuss this, as the plaintiff through his pleader has expressed his willingness to forego his present claim,

(1) (1884) 28 Ch. D. 255 at p. 262.

(2) (1807) 13 Ves. 546.

(3) (1855) 24 L. J. Ex. 78.

(4) (1871) L. R. 6 Q. B. 507.

and give up the land, provided he be restored to his original position by being refunded what shall be decided to be due to him in respect of all he has paid in connection with his purchase and the mortgage.

These are the principles that govern in those cases, of which this is a type, but we cannot now apply them here as the findings of fact are defective.

The issues necessary to a proper determination of this point are:—

1. Was the unlimited covenant against incumbrances as expressed in the conveyance contrary to the concurrent intention of all the parties?
2. If so, what was the real agreement between the parties?
3. If the unlimited covenant was not contrary to the concurrent intention of all the parties, did the defendant No. 1 enter into that covenant under any and what mistake?
4. If there was a mistake on the part of the defendant No. 1, (a) was this known to the plaintiff No. 2 at the date of the conveyance containing the covenant and (b) could the plaintiff No. 2 in the circumstances reasonably have supposed that the covenant expressed the real intention of defendant No. 1?

For the purpose of determining the existence of mistake in a written document oral evidence is admissible when the circumstances are appropriate: see proviso 1 to section 92 of the Evidence Act. This evidence must be clear, and the Court in weighing it will be entitled to take into consideration defendant No. 1's capacity and all the circumstances as they existed at the date of the sale to plaintiff No. 2.

There is another aspect of this case, which has not been presented to us, but which we think calls for allusion. The second defendant is illiterate, and it is established that if a man, who cannot read, has a written contract falsely read over to him and the contract written differs from that pretended to be read, the signature of the document is of no force because he never intended to sign, and therefore in contemplation of law did not sign the document on which the signature is: *Foster v. Mackinnon*⁽¹⁾. And it is all one in law to read it in other words and to declare the effect thereof in other manner than is contained in the writing: *Thoroughgood's case*.⁽²⁾ But if a person executes

(1) (1869) L. R. 4 C. P. p. 711.

(2) (1582) 1 Co. Rep. (Part 11) 445.

1904.

DAGDU.

"
BHANA.

1904.

DAGDU
v.
BHANA.

a document knowing its contents but misappreciating its legal effect he cannot deny his execution. For the purpose of dealing with the case on this footing a finding on the following issue is requisite.

Prior to the execution by defendant No. 2 of the document, was the covenant falsely read over to him or was the effect thereof declared to him in other manner than is contained in the writing, and if so, in what manner?

There will be a remand for the determination of these issues and the return must be in two months. No further evidence unless the Judge deems it necessary.

Issues sent back.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batley.

1904.

March 3.

RANCHOD SHAMJI (ORIGINAL DEFENDANT), APPELLANT, v. ABDUL-BHAI MITHABHAI (ORIGINAL PLAINTIFF), RESPONDENT.*

*Ownership of soil—Encroachment by protrusion of beams—
Mandatory injunction.*

Plaintiff's beams overhung defendant's soil and defendant erected a building which overhung those beams. A question having arisen as to whether the beams gave the plaintiff a right to the column of air above them,

Held, that the defendant being the owner of the soil was entitled *prima facie* to all above it and the diminution in his rights by reason of the beams did not extend beyond the protrusion of the beams themselves.

SECOND APPEAL from the decision of Chandulal M., First Class Subordinate Judge of Ahmedabad, with Appellate Powers, varying the decree of N. V. Samant, Subordinate Judge of Dohad.

The plaintiff sued for the removal of a superstructure newly raised by the defendant on the open ground adjoining the back wall of the plaintiff's house alleging that the said superstructure prevented the access of light and air coming to his house from over the ground, or in the alternative that such part of the

* Second Appeal No. 565 of 1903.

superstructure be removed as had been raised by the defendant over and above the *dadhavaris* (projecting beams) inserted by the plaintiff in his own wall underneath his (plaintiff's) roof.

The defendant denied that there was any open land as alleged close to the wall of the plaintiff's house and contended that the said land belonged to him; that he had a right to use it as he chose and that on the plaintiff's request he permitted the plaintiff to open a *jali* (lattice) in the back wall of his house.

The Subordinate Judge found that the plaintiff had proved that he had acquired an easement to light and air through a *baku* (hole) in the back wall on the ground floor of his house and similarly through one on the second floor; that the plaintiff had no right to the removal of the new structure raised by the defendant and that the plaintiff was entitled to receive from the defendant rupees fifteen as damages. He, therefore, passed a decree accordingly.

On appeal by the plaintiff the Judge raised in all six issues, out of which the first four were as follows :—

- (1) Is the plaintiff entitled to the right of easements regarding the light and air as claimed by him in his plaint?
- (2) If so, can he have the defendant's superstructure demolished as sought for by him?
- (3) If not, can the plaintiff be awarded damages, and if so, what?
- (4) Are the *dadhavaris* attached to the plaintiff's house old? Is the plaintiff entitled to keep them on? and can the plaintiff have a part of the defendant's superstructure removed on that ground?

As there was no issue raised by the Subordinate Judge about the *dadhavaris* and as the evidence recorded by him was not sufficient to enable the Appellate Court to come to a finding on issues (3) and (4), the case was remanded for recording additional evidence and for findings on the said issues.

On the remand the Subordinate Judge took fresh evidence and found that (3) the plaintiff should be awarded rupees twenty-five as damages and that (4) the *dadhavaris* were about forty years old and the plaintiff was entitled to keep them free from any interference and that he was entitled to the removal of so much of the defendant's superstructure as affected the user of the *dadhavaris* by the plaintiff.

1904.

RANCHOD
SHAMJI
v.
ABDULABHAI
MITHABHAI.

1904.

RANCHOD
SHAMJI

v.

ABDULABHAI
MITHABHAI.

The Judge found that (1) the plaintiff had acquired the right to receive light and air through the two apertures in question, one opening on the ground floor of his house and the other on the second floor of it by way of easement; that (2) the plaintiff could not have the defendant's superstructure removed on the ground of its interfering with the said right of easement; that (3) the plaintiff was entitled to rupees twenty-five only as damages for the defendant's interference with that right and that (4) the *dadhavaris* were forty years old and the plaintiff was entitled to have them left intact and to have such part of defendant's superstructure removed as stood over and above those *dadhavaris* and affected or interfered with the use of them by the plaintiff. The Judge, therefore, passed a decree in the following terms:—

1, therefore, vary the decree of the Court below and direct that the plaintiff do recover Rs. 25 as damages from the defendant for the diminution of light and air caused by him, and that the defendant do remove that part of his superstructure which he has raised over the plaintiff's *dadhavaris* and which affects or interferes with the plaintiff's use of them; and that in default the plaintiff will be entitled to have them removed and do remove them according to law through the Court at the defendant's expense in the execution proceedings. The rest of the plaintiff's claim is rejected hereby.

The defendant preferred a second appeal.

H. C. Coyaji, for the appellant (defendant):—The Judge was wrong in granting the mandatory injunction for the removal of our new structure overhanging the plaintiff's beams which projected over our land. The land admittedly belongs to us and consequently we are the owners of all things above it up to the skies, *cujus est solum ejus est usque ad calum*.

The plaintiff has, by the projection of his beams on our land, at the most acquired a right of easement, but we cannot thereby lose our right to build on our land so long as we do not disturb the plaintiff's right. Even supposing that the projection of the plaintiff's beams on our land for several years gave him a right to disturb our possession of the land, still we contend that he can get a right to the extent of the projection not to the whole column of air above it.

Lallubhai A. Shah, for the respondent (plaintiff):—The projection is not in the nature of an easement. It is tantamount to occupation of the defendant's immovable property: *Mohanlal Jechand v. Amratlal Becharadas* ⁽¹⁾, see Printed Judgments for 1879, page 27. If it be treated as trespass on defendant's immovable property, then we contend we have acquired a right to the space occupied by the projection underneath and above, *cujus est solum ejus est usque ad calum*: *Harvey v. Walters*.⁽²⁾ The mandatory injunction was, therefore, properly granted.

H. C. Coyaji, in reply:—He referred to *Corbett v. Hill*.⁽³⁾

JENKINS, C. J.:—The plaintiff's beams overhang the defendant's soil, and the defendant has erected a building which overhangs those beams. The lower Appellate Court has granted a mandatory injunction directing the removal of the building.

The sole question is whether the beams have given the plaintiff a right to the column of air above them.

The defendant being the owner of the soil is entitled *prima facie* to all above it, and in our opinion the diminution in his rights by reason of the beams does not extend beyond the protrusion of the beams themselves: see *Corbett v. Hill* ⁽³⁾ and *Harris v. De Pinna*.⁽⁴⁾

The injunction must, therefore, be dissolved and the decree must be varied to that extent.

The appellant will get the costs of this appeal.

Decree varied.

(1) (1878) 3 Bom. 174.

(2) (1872) L. R. 8 C. P. 162 at p. 163.

(3) (1870) L. R. 9 Eq. 671.

(4) (1886) 33 Ch. D. 238 at p. 260.

1904.
RANCHOD
SHAMJI
v.
ABDULABHAI
MITHABHAI.

APPELLATE CIVIL.

Before Mr. Justice Chandavankar and Mr. Justice Aston.

1904.
March 10.

VIRBHADRAPA PIN ADRASHAPA JAVLI (ORIGINAL PLAINTIFF),
APPELLANT, v. BHIMAJI BALAJI SARAFF (ORIGINAL DEFENDANT 1),
RESPONDENT.*

Indian Stamp Act (Act I of 1879), section 11—Act II of 1899, section 12 (3)
—Adhesive stamp—Cancellation.

The mere drawing of two parallel lines without more over a receipt stamp affixed to an instrument does not have the effect of cancelling it "so that it cannot be used again" within the meaning of the Stamp Act.

SECOND APPEAL from the decision of Gangadhar V. Limaye, Joint First Class Subordinate Judge, with Appellate Powers, reversing the decree passed by V. D. Joglekar, Subordinate Judge of Saundatti.

The plaintiff sued to recover Rs. 567-15-3, being the loan on a *hundi* dated the 17th October, 1897. The suit was filed on the 17th October, 1900. The defendant denied all knowledge of the *hundi* and denied the claim.

The receipt stamp on the *hundi* was cancelled by some parallel lines drawn across it. The Subordinate Judge held that the stamp was not sufficiently cancelled and that the *hundi* was therefore inadmissible in evidence. On the 25th February, 1901, he held that the plaintiff could ignore the *hundi* and sue on the original loan.

The Subordinate Judge held that the loan by plaintiff was proved and passed a decree for Rs. 466-8-0.

On appeal the lower Appellate Court held that as the plaintiff was allowed to convert the original claim on a *hundi* into one for the recovery of a loan, on the 25th February, 1901, the plaintiff ought to be taken as presented on that day; and so taken the plaintiff's claim was barred by limitation.

The plaintiff appealed to the High Court.

S. R. Bikhale, for the appellant (plaintiff).

K. H. Kelkar, for the respondent (defendant).

* Second Appeal No. 668 of 1903.

CHANDAVARKAR, J. :—The suit was brought by the appellant to recover a debt for which a *hundi* was drawn by defendant No. 1 on the 17th December, 1897. In his plaint the appellant stated the cause of action to have arisen in consequence of the dishonour of the *hundi* by one Gopal Naik on whom it was drawn. The *hundi* bore a stamp of one anna with two lines drawn over it. The Subordinate Judge held that as these two lines drawn across the stamp were not "cancellation" within the meaning of the Stamp Act, the *hundi* was not duly stamped and no suit could lie on it. But he allowed the appellant to proceed with the suit on "the original loan," and, having found the loan proved, passed a decree in his favour. In appeal, however, the First Class Subordinate Judge, with Appellate Powers, found that the claim was not in time and rejected it. In this second appeal Mr. Bakhle, pleader for the appellant, has contended, first, that the stamp borne by the *hundi* is "cancelled" as required by law. The case is governed by the Stamp Act of 1879, section 11 of which did not prescribe any particular form of cancellation, but merely provided that it should be so cancelled that the stamp "cannot be used again." The Stamp Act of 1899 (clause 3 of section 12) points out as a guide how the cancellation may be effected. Substantially, there is no difference between the old and the new law. Now, the simple question is whether the mere drawing of certain lines without more over the stamp has the effect of cancelling it so that it "cannot be used again." The answer to that question must, in our opinion, be in the negative. The law being that a used stamp cannot be used again the object of the Legislature in making cancellation obligatory is that the used stamp should bear on it some effective mark to show that it has been used. Two parallel lines drawn over a stamp are not sufficient to carry out that object, because mere lines would not be effective for the purpose in view. This view is in accordance with the observations of this Court in *Anandrao v. Duolatrao* ⁽¹⁾ though the actual decision there turned upon another point. In *S. A. Ralli v. Caramalli Fazal* ⁽²⁾ the stamp on one of the documents sued on was cancelled "by a small portion of the first letter of the defendant's signature consisting of a slightly curved line" and Sargent,

1904.

VIRBHA.
DHAPA
BHMAR.

(1) (1888) P. J. p. 361. (2) (1890) 14 Bom. 102 at p. 111.

1904.
VIRBHA-
DRAPA
v.
BHIMAJI.

C. J., and Bayley, J., held that "whatever may have been intended by the small ink line upon the right side of the stamp in one of these documents, it did not effect such a cancellation of the stamp as is prescribed by section 11 of the Stamp Act." We fail to see any difference between "a small ink line" and "two lines." The latter is as ineffective as a mark of cancellation as the other.

Then the next question is, can the appellant be allowed to sue on "the original loan?" In our opinion the Subordinate Judge was right in allowing the suit to proceed as one brought to recover the original loan. The plaint states that the amount was lent and the defendant gave a *hundi* which, however, was dishonoured by the person on whom it was drawn, because he had no assets in his hands belonging to the defendant. It goes on to state that the cause of action arose not on the date the *hundi* was dishonoured, but on the 17th October, 1897,—i.e., the date of the loan. Had the plaintiff intended to sue on the *hundi* alone, his cause of action would have arisen on the former date and he would have so stated it. But the date actually assigned for the cause of action is sufficient to show that the plaintiff substantially intended to sue and did sue on the loan independently of the *hundi* as well as upon the *hundi* itself. That being our view of the plaint, we must hold that the lower Appellate Court was wrong in treating the suit as not having been brought originally on the loan as well as the *hundi*. The lower Appellate Court having found the loan proved, we must reverse its decree and award to the plaintiff Rs. 567-9-3 from defendant No. 1 with costs throughout on the said defendant.

Decree reversed.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Butt.

APPAJI BIN RATNAPPA SHENDYA (ORIGINAL PLAINTIFF), APPELLANT,
v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND ANOTHER
(ORIGINAL DEFENDANTS), RESPONDENTS.*

1904.

March 15.

Bombay Revenue Jurisdiction Act (X of 1876), section 4 (a) †—Service land—Sanad grant—Suit for the recovery of possession—Secretary of State for India in Council, defendant—Jurisdiction.

The plaintiff, a vendee of certain lands assigned as remuneration for village service, having brought a suit for the recovery of the lands against the Secretary of State for India in Council and another defendant who was put in possession of the lands by Government officers,

Held, that under section 4 (a) of the Bombay Revenue Jurisdiction Act (X of 1876), a Civil Court had no jurisdiction to entertain the suit against the Secretary of State for India in Council (the grant being of land and not of revenue).

The plaintiff having contended that his claim was for the possession of lands and not for the revenue arising therefrom which alone was granted,

Held, that the plaintiff's vendor was put into the occupation of the land free from assessment as the reward of his service and that his remuneration did not and could not consist in an exemption from assessment in respect of the lands without reference to his occupation.

APPEAL against the decision of J. C. Gloster, District Judge of Belgaum, in Original Suit No. 117 of 1903.

* Appeal No. 117 of 1903.

† Section 4 (a) of the Bombay Revenue Jurisdiction Act (X of 1876).

4. Subject to the exceptions hereinafter appearing, no Civil Court shall exercise jurisdiction as to any of the following matters :—

(a) Claims against Government relating to any property appertaining to the office of any hereditary officer appointed or recognized under Bombay Act No. III of 1874, or any other law for the time being in force, or of any other village-officer or servant, or

claims to perform the duties of any such officer or servant, or in respect of any injury caused by exclusion from such office or service, or

suits to set aside or avoid any order under the same Act or any other law relating to the same subject for the time being in force passed by Government or any officer duly authorized in that behalf, or

claims against Government relating to lands held under treaty, or to lands granted or held as saranjām, or on other political tenure, or to lands declared by Government or any officer duly authorized in that behalf to be held for service.

1904.

APPAJI
v.
THE SECRETARY OF
STATE FOR
INDIA.

The plaintiff sued the Secretary of State for India in Council as defendant 1 and another person named Chandkhan valad Dada Sanadi as defendant 2, to recover possession of Survey Nos. 43 and 77 in the village of Karajgi in the Chikodi Taluka of the Belgaum District, alleging that he was the vendee of one Shivapa Joti to whom the lands belonged; that he was dispossessed by the Collector of Belgaum in August, 1901, and that the lands were given in the possession of defendant 2 from whom the Sanadi service formerly rendered by the plaintiff was thenceforth accepted by Government.

Defendant 1 pleaded, *inter alia*, that the Court had no jurisdiction to entertain the suit and that Shivapa had no right to transfer the lands inasmuch as they were service lands assigned for the remuneration of the Police Sanadi and therefore inalienable without the sanction of Government.

Defendant 2 relied on his title as derived from Government.

Shivapa's title to the lands was an extract (Exhibit 29) relating to the Inám Register which contained twenty-two columns. The entry in the 2nd column, which gave the class and the period for which the inám was to continue, was as follows:—

Police Non-ratandár. As long as the service is required by Government.

In the 4th column the name of the owner was given, namely, Sadu bin Balappa Raghoji. The 20th column showed that the assessment on the lands was twenty-one rupees and the last column, that is, the column of remarks about the transfer or exchange contained the following:—

An enquiry was made about the said person having become old and unfit to render service and a report, No. 30, dated 18th May, 1898, was made to Ilakha Huzur (Collector); below that the District Magistrate of Belgaum passed an order, No. 169, dated 6th June, 1898, which having been received and also an order of the Jamabandi (Revenue) Register, No. 151, having been received to enter the name of Shivapa bin Joti, the name of Shivapa Joti is entered. Fasli year 1308 (1898-99).

The Judge dismissed the suit for want of jurisdiction to entertain it under section 4 (a) of the Bombay Revenue Jurisdiction Act (X of 1876) inasmuch as the lands in suit appertained to the office of Police Sanadi.

The plaintiff having appealed,

S. R. Bakhle appeared for the appellant (plaintiff):—The Judge was wrong in holding that Civil Court had no jurisdiction to entertain a suit like the present under section 4 of the Bombay Revenue Jurisdiction Act. It was for the defendant to show that the claim fell under that section. The Secretary of State ought to have shown that the claim related to property appertaining to the office of a village servant. It was therefore necessary to find what was the nature of the property that was assigned for remuneration. Government must show that it was the land that was so assigned and not merely the revenue or the assessment thereon. Ordinarily when there is a grant by Government, it is the grant of the royal share and not of the land. What we claim in this suit is the lands and not exemption from the payment of assessment. We contend that what was assigned by Government as remuneration for service was the assessment on the lands and not the lands. We admit that a suit for the recovery of assessment assigned for service cannot lie. But a suit for the possession of lands stands on a different footing. This distinction, it seems, was not present to the mind of the Judge.

Further, the order dismissing the suit was clearly wrong. If our suit could not lie against the Secretary of State, the Judge should have returned the plaint for presentation to the proper Court to proceed against defendant 2.

Ráo Baháddur V. J. Kirtikar (Government Pleader) appeared for respondent 1 (defendant 1):—We contend that all the *shet sanadi* lands are grants of lands and not merely of revenue thereon. But whatever may be the general nature of such grants, the grant in suit is a grant of land, see Exhibit 29. The column of remarks in that Exhibit shows that the plaintiff's predecessor-in-title was put in possession of land after the removal of the previous grantee on account of his old age. The grant was, therefore, clearly a grant of land.

K. H. Kelkar appeared for respondent 2 (defendant 2):—It was not necessary for the Judge to return the plaint for presentation to proper Court. If Government is competent to take the land from one servant and give it to another, no suit can lie against us.

1904.

APPANT
v.
THE SECRETARY OF
STATE FOR
INDIA.

1904.

APPAJI
v.
THE SECRETARY OF
STATE FOR
INDIA.

Bakhle, in reply : - Exhibit 20, no doubt, shows that the land was granted to the plaintiff's predecessor during the life-time of the previous servant, but that previous servant was the grandfather of the new nominee. The Government, therefore, did not remove one servant and give the land to a stranger. It was given to the person next entitled to the property as heir.

With respect to the contention of defendant 2 we submit that we are entitled to proceed with our claim against him. It would be too early at this stage to say what would be the result of the suit against him.

JENKINS, C. J. : - The plaintiff sues to recover possession of Survey Nos. 43 and 77 in the village of Karajgi in the Chikodi Taluka of the Belgaum District, and has made as defendants to his suit the Secretary of State for India in Council and one Chandkhan who has been put into possession by the Government officers.

The Secretary of State for India has taken the objection that the suit will not lie against him, because of section 4 (1) of the Bombay Revenue Jurisdiction Act, X of 1873, which provides that subject to exceptions with which we are not now concerned "no Civil Court shall exercise jurisdiction as to claims against Government relating to any property appertaining to the office of any hereditary officer appointed or recognized under Bombay Act III of 1874 or any other law for the time being in force, or of any other village officer or servant....."

It is conceded by the plaintiff that he comes within the description of village officer or servant, but he maintains that the claim against Government in this suit does not relate to property appertaining to his office, and he seeks to make this out by arguing that his claim is for the possession of land, while the property that appertains to his office is not the land but the revenue arising from the land.

The District Judge has not dismissed the case in view of this distinction, and it is probable that this is due to the fact that the point was not made before him as it has been before us by Mr. Bakhle, who has argued the case with great care and ability. At one time we were much disposed to accept the view put forward by Mr. Bakhle recognizing that these sanad grants are

for the most part grants of the royal share of revenue and not of the land.

But the matter has been placed before us very clearly by the Government Pleader with the result that we think the just inference to be drawn from Exhibit 29, which was properly admitted as evidence in this case, is that Shivappa from whom the present plaintiff claims as vendee was put into the occupation of the land free from assessment as the reward for his service, and that his remuneration did not and could not consist in an exemption from assessment in respect of the land without reference to his occupation. Therefore we think that so far as the Government is concerned the suit cannot be entertained by reason of the provision in section 4 (a) of the Bombay Revenue Jurisdiction Act, 1876.

This brings us to the second objection urged by Mr. Bakhle that in case we arrive at this conclusion the District Judge was in error in dismissing the suit.

We think that this objection is well founded, and that whatever may be the fate of the suit when it comes before the proper Court on proper materials, it is the plaintiff's right now that the suit is dismissed as against the Government, to have the plaint returned to him for presentation in the proper Court, and the decree of the District Judge must be varied in that respect.

The Secretary of State for India in Council will be entitled to his costs here and in the Court below, but the costs of the second defendant here and in the Court below must abide the result of the suit.

Decree varied.

1904.

APPENDIX
TO
THE SECRETARY OF
STATE FOR
INDIA.

APPELLATE CIVIL

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

1904.
March 18.

NARSINGDAS TULSIRAM (ORIGINAL PLAINTIFF), APPELLANT, v. RAHIMANBAI, WIDOW OF GHASIMIYA, AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Indian Evidence Act (I of 1872), section 115—Estoppel, requirements of—Acquiescence—Question of legal inference—Plea of estoppel appearing for the first time in issues in appeal.

Acquiescence is not a question of fact, but of legal inference from facts found. This principle applies also to estoppel.

To create an estoppel it is not sufficient to say that it may well be doubted whether the plaintiff would have acted in the way he did but for the way in which the defendants had acted. It must be found that the plaintiff would not have acted as he did. It must be found that the defendants by their "declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief."

A plea of estoppel should not be given effect to in appeal when it was not suggested in the written statement, nor made one of the issues in the first Court, nor one of the grounds of appeal, and only appears for the first time in the issues raised by the lower Appellate Court. In such a case the High Court can interfere in second appeal.

SECOND APPEAL from the decision of J. J. Heaton, District Judge of Násik, confirming the decree of G. R. Gokhale, Subordinate Judge of Pimpalgaon.

Suit to recover a mortgage-debt by sale of the mortgaged property.

In the year 1739, the then Emperor of Delhi conferred the hereditary office of Kázi of the Chandavad Pargana and one *chahur* of land in *inám* for the expenses of that office on Mahamad Kamrudin valad Mahamad Husein, the ancestor of Ghasimiya valad Kamamodin, deceased, the husband of defendant 1, and Javavodin *alias* Javer Saheb valad Jamamodin, defendant 6, who was the officiating Kázi. In 1885, defendant 6 entered into an agreement with two other members of the Kázi family, namely, the above-mentioned Ghasimiya and one Dadamiya, by which it was provided that leases for the land should be taken in the names of all three persons and that Ghasimiya

* Second Appeal No. 469 of 1903.

should receive a moiety, and Dadamiya and Javavodin should each receive a fourth of the rents. Thereafter the three sharers dealt with the shares very much as if they were their private property, but without any intention to divide the vatan property irrevocably. On the 18th July, 1892, Ghasimiya mortgaged his joint half share in the land to the plaintiff. The mortgage purported to be with possession, but it was not so in fact. In the year 1899 the plaintiff brought a suit on his mortgage to recover Rs. 1,935, alleging that defendants 2 and 3 were joined because they were the heirs of the deceased mortgagor, and defendants 4 and 5 were joined because they had purchased a part of the mortgaged property. The plaintiff prayed for a decree enabling him to recover the amount in suit and costs by sale of the mortgaged property and the other property of the deceased mortgagor.

Defendants 2 and 3 denied the mortgage in suit and contended that the property comprised in the mortgage was the hereditary Kázi vatan of their family and therefore inalienable and, presuming that Ghasimiya had a right to mortgage it, the mortgage became null and void after his death.

Defendant 6 pleaded similar defences and added that he was the officiating Kázi.

The remaining defendants, namely, defendants 1, 4 and 5, were absent.

The Subordinate Judge found that the deceased Ghasimiya executed the mortgage bond in suit and received consideration under it; that the mortgaged property formed part of the Kázi vatan of the Kázi of Chandavad and as such was inalienable; that the deceased Ghasimiya had no authority to alienate the said property beyond his lifetime; that he was never in possession of the property, and that the plaintiff was not entitled to recover the mortgage-debt by sale of the property in suit. He therefore passed a decree in the following terms:—

I, therefore, reject the plaintiff's claim so far as he prays for recovery of the debt sued for out of the land in suit, and order him to recover the amount claimed and his costs out of the estate of the deceased defendant No. 1 Ghasimiya, except the Chandavad Kázi vatan property. The plaintiff should pay the costs of defendants Nos. 2, 3 and 6.

1904.

NARSINGDAS
v.
RAHIMANBAI.

1904.

NARASINGDAS
v.
RAHIMANBAI.

On appeal by plaintiff the Judge raised four issues, namely :—

1. Is the property in suit alienable or inalienable?
2. Had Ghasimiya power to alienate it beyond his lifetime?
3. Is defendant No. 6 estopped from contending that Ghasimiya had not such power?
4. Is the watan a wakf?

The findings were :—1, Inalienable. 2, He had the power to alienate it during the life of, or tenure of office as Kázi by, defendant 6. 3, In the affirmative. 4, In the negative. The Judge confirmed the decree. The following are extracts from his judgment :—

Is the mortgage good against the Kázi if all considerations of public policy be excluded? I think it is. It is true the Kázi agreed that Ghasimiya should take half the rents of the vatan lands intending that the agreement should hold good during Ghasimiya's lifetime only and that there should be no permanent alienation of a share in the rents. This was held by the Subordinate Judge, and though the proposition was to some extent contested in appeal I have no doubt as to its correctness. But the Kázi had also mortgaged his share to the plaintiff at a date prior to Ghasimiya's mortgage (Exhibit 61).

He had also become the tenant under the plaintiff of Kázi service lands mortgaged to the plaintiff by the members of the Kázi family (Exhibit 71). So that not merely by his dealings generally, but by his dealings with the plaintiff himself, the Kázi gave him ample reason to believe that the lands could properly be mortgaged and were a good security. Seeing that prior to Ghasimiya's mortgage to the plaintiff the Kázi had himself mortgaged his share in certain of the vatan lands to the plaintiff (Exhibit 61), it must be assumed that the latter had received that assurance of title which in some countries is obtained by scrutiny of the title-deeds. And this assurance of title was due to the acts of the Kázi himself; had he not acted as he did *it may well be doubted* whether the plaintiff would have advanced money on Ghasimiya's mortgage. That being so, it seems to me that the Kázi may not now contend that Ghasimiya had not authority to mortgage the lands. It follows that as between him and the plaintiff only, the claim is good; that is, if all questions of public policy be set aside.

It is true there is nothing to show, and it is not to be presumed from the facts disclosed, that Ghasimiya ever was given, or that it was intended to give him, anything beyond a life interest in the lands. It is true also that by their tenure the lands are inalienable and that by due inquiry the plaintiff could have discovered the nature of the tenure, for in the mortgage deeds the lands are described as Kázi vatan lands. Nevertheless by the Kázi's own conduct in mortgaging some of the service lands to the plaintiff the latter was absolved as against the Kázi from making that inquiry into title, which otherwise

would be properly required of him ; and this consideration applies to the lands mortgaged by Ghasimiya, though the Kázi did not consent to or acquiesce in that particular mortgage. Both the law of estoppel and equitable considerations apply here. The Kázi who has, when it suited him, dealt with service lands as if they were alienable private property, cannot be heard purely on his own behalf, in favour of the proposition that the lands are inalienable service lands. I cannot find an authority precisely in point ; but the principles on which the authorities have proceeded apply to this case with the effect I have stated.

The conclusions I have arrived at are these :—That the lands being service lands to which each Kázi succeeds in virtue of his office ordinarily cannot lawfully be alienated beyond the term of office of the Kázi officiating at the time of the alienation ; but that in this case the Kázi is estopped from contending that the alienation is invalid. In other words, the plaintiff is entitled to recover his debt from the mortgaged lands so long as the present Kázi holds office. What, then, is the appropriate decree ? The Court should not order a sale of the lands, for to do so would be to give effect absolutely to an unlawful alienation which is good only as against the Kázi now officiating. It cannot be in accordance with public policy to do this ; no Court would be justified in bringing about a final alienation of such property. To do so would be to encourage the misappropriation of service lands ; in other words, to encourage fraudulent dealing. This point seems to me to be absolutely clear. Nevertheless the plaintiff is entitled to some relief and the appropriate relief would seem to be to place him in possession of the mortgaged lands until the debt is paid off out of the profits of the land or until the defendant No. 6 shall die or cease to officiate as Kázi, whichever of these events first happens.

* * * * *

It seems to me that the plaintiff is entitled to some relief, though he is not entitled to have the lands sold. The appropriate relief would be to place him in possession ; but this has not been previously suggested and I am not prepared to act on the suggestion until the parties have been heard regarding it.

I must, therefore, set down the case for further hearing on the basis of the conclusions stated in this judgment. * * *

Násik, 29th May 1903.

(Signed) J. J. HEATON,

District Judge.

This question of possession has led to the consideration of a number of points, the result of which is that I do not think that I can properly award possession in this suit to the plaintiff. In the first place he did not obtain possession at the time of the mortgage, though it purports to be for possession and recites that the mortgagee has taken possession. If he chose to neglect his own interests to this extent he is not now entitled to any particular consideration at the hands of a Court. In the next place it is urged on behalf of the Kázi that if the question of possession had been raised whilst the suit was in progress, the evidence would have been looked at from a different point of view

1904.

NARSINGDAS
v.
RAHIMANBAI.

1931.

NAESINGDAS

v.

RAHIMNARAI.

and other evidence might have been adduced which would have had a material bearing on the matter. This is true. Various questions do arise; for example, whether Ghasimiya's interest in the property mortgaged to any extent survived his death and became vested in his widow: whether the conduct of the Kāzi can properly be held to have had any real influence in inducing in the mind of the mortgagee a belief that he would have a hold, over the property after Ghasimiya's death, or whether this belief was independent of anything which the Kāzi did. Such questions would involve a reconsideration of the evidence and possibly its amplification; and though this would not change the essential nature of the suit, which is in substance a suit to recover the mortgage-debt, it would import into the suit considerations of an entirely new kind, and would necessitate a fresh consideration of the evidence from an entirely new point of view. Bearing in mind these considerations and the fact that possession was not asked for by the plaintiff, I must confirm the decree of the lower Court. At the same time it must be understood that I have not decided as a point in issue that possession could not be legally awarded. The decree of the lower Court is confirmed.

Nāsik, 22nd June 1903.

The plaintiff preferred a second appeal and defendants 2 and 6 filed cross-objections.

Scott (Advocate General) with *D. A. Khare*, for the appellant (plaintiff):—The Judge found as a fact that defendant 6 was estopped from pleading the inalienable nature of the lands in suit. That finding, being a finding of fact, is binding in second appeal. On the said finding the Judge should have allowed our claim against the lands in suit.

[JENKINS, O. J., referred to *Lala Beni Ram v. Kundan Lall*.¹⁾]

Branson (with *R. R. Desai*), for the respondents (defendants):—Estoppel is not a question of fact. It is a question of legal inference to be drawn from the facts as found. We, therefore, contend that the present case clearly falls within the principle laid down in *Lala Beni Ram v. Kundan Lall*.⁽¹⁾ It is an admitted fact that the mortgage in suit was not brought about by any act or declaration on the part of the defendants. What the Judge found was that the plaintiff would not have acted in the manner he did, but for the way the defendants had acted. This circumstance is not sufficient to create an estoppel.

Scott, in reply.

⁽¹⁾ (1899) 26 I. A. 58.

JENKINS, C. J. :—The plaintiff has brought this suit to realize the amount due to him on a mortgage by sale of the property comprised in it and by recovering personal judgment against the mortgagor.

The Subordinate Judge rejected the claim so far as the plaintiff prayed for recovery of the debt out of the land in suit, but ordered the plaintiff to recover the amount claimed and his costs out of the estate of the deceased Ghasimiya.

The ground of his decision was that the property in suit forms part of Kázi vatan and that Ghasimiya, the mortgagor, had no authority to alienate the property beyond his life.

Ghasimiya was dead when the suit was brought.

From that decree an appeal was preferred to the District Judge, who delivered his first judgment on the 29th May, 1903, and he therein agreed that the property was inalienable, and that Ghasimiya had power only to alienate it during the life of, or tenure of office as Kázi by, defendant No. 6. However, he held that defendant No. 6, who is the real defendant in the suit, is estopped from contending that Ghasimiya had no power of alienation beyond his lifetime.

Still for all that, in a further judgment delivered by the District Judge on the 22nd June, 1903, he confirmed the decree of the lower Court.

The Advocate General, representing the appellant before us, has contended that this decree of the District Judge is manifestly wrong, and if we were able to hold there was an estoppel, we think the Advocate General's argument would have been irresistible.

But in support of the decree it has been contended by Mr. Branson for the defendants, who have filed cross-objections, that the finding of estoppel cannot be supported.

The Advocate General has suggested that it is not open to us to go into this question in second appeal.

But I think that argument cannot prevail, because it has been held in *Lala Beni Ram v. Kundan Lall*,⁽¹⁾ that acquiescence is not a question of fact, but of legal inference from the facts found, and what is there said of acquiescence is equally

1904.

NARAYNDAS
v.
RAHIMABAI.

1904.

NARSINGDAS

v.

RAHIMANBAI.

applicable to estoppel. It is, we think, clear on the Judge's own findings that no case of estoppel has been established.

The law of estoppel is defined by section 115 of the Evidence Act, and all the Judge is able to say is that it may well be doubted whether the plaintiff would have acted in the way he did but for the way in which the defendants had acted. That is not sufficient. It must be found as a fact that the plaintiff would not have acted as he did. It must be found that the defendant by his "declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true, and to act upon such belief," and the Judge has come to no finding which approaches this requirement.

The Judge himself in a later part of his judgment says that the Kāzi, *i.e.*, the sixth defendant, did not consent to, or acquiesce in, a particular mortgage in respect of which he is said to be estopped, and when we come to the supplemental judgment of 22nd June, 1903, it is obvious that the Judge's mind was not convinced of the existence of those conditions which we have described as being imperative for the application of the doctrine of estoppel. But apart from this we think we could have interfered on second appeal, inasmuch as the plea of estoppel was not suggested in the written statement; it was not made one of the issues in the first Court; it was not made a ground of appeal to the District Judge, and it for the first time makes its appearance in the issues raised for decision in the lower Appellate Court.

We think in these circumstances it was wrong for the Judge to have entertained the plea at that stage.

For these reasons we think that the decree must be confirmed with costs.

Decree confirmed.

. APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

HANSRAJ LAKHMIDAS (ORIGINAL PLAINTIFF), APPELLANT, v.

LALJI ANANDJI (ORIGINAL DEFENDANT), RESPONDENT.*

1904.

March 16.

Civil Procedure Code (Act XIV of 1882), section 43—Earlier suit on an adjusted account—Subsequent suit on a mortgage—Distinct causes of action—Relief not claimed in the earlier suit.

A plaintiff omitted to claim relief in a suit on an adjusted account which he subsequently claimed in a suit based upon a mortgage.

Held, that the causes of action for the two suits being distinct, the omission to claim the relief in the earlier suit did not operate as a bar to the subsequent suit under section 43 of the Civil Procedure Code (Act XIV of 1882).

APPEAL from the decision of R. B. P. Cator, Judge of Her Britannic Majesty's Court for Zanzibar, in Civil Case No. 196 of 1899.

The plaintiff and one Khimji Jairam, both of whom were trading at Zanzibar, had extensive dealings with each other. Khimji's affairs having subsequently become much involved, certain persons in German territory obtained against him a decree whilst he was in Cutch in India, and sought to enforce it by the sale of some of his shops in Dar-es-Salaam at Zanzibar. Under these circumstances the defendant, who was Khimji's *Munim* (manager) at Zanzibar, applied to the plaintiff for assistance to pay the decretal debt and to rescue the shops. This was done upon certain conditions by which the defendant pledged his own credit for payment of the debt in case Khimji failed to pay. The transaction was carried through by means of two documents, one of which was a mortgage by Khimji to the defendant and the other a sub-mortgage by the defendant to the plaintiff. In the sub-mortgage the defendant undertook to collect and to hold the rents of the shops for the plaintiff. In the year 1899 the plaintiff brought two suits, namely, (1) No. 193 of 1899 and (2) No. 196 of 1899, against the defendant in Her Britannic Majesty's Court at Zanzibar. In Suit No. 193 the plaintiff sought to recover a certain sum from the defendant on the basis of an account of the rents and profits of the shops rendered by the defendant up to

* Appeal No. 22 of 1903.

1804.

HANSRAJ
LAKHMIDAS

v.

LALJI
ANANDJI.

Kartak Sud 2nd, Samvat 1951 (1894-95 A.D.), reserving his right to claim further account for the rents and profits subsequent to the date aforesaid. In Suit No 196 which was brought upon the sub-mortgage the plaintiff prayed that the defendant might be called upon to account to the plaintiff for the rents and profits of the shops from Kartak Sud 2nd, Samvat 1951, up to the date of the institution of the suit and further rent till date of decree. The Judge gave to the plaintiff a decree in the first suit, but he dismissed the second suit on the following grounds :—

I am afraid there can be no doubt that I must decide this case against the plaintiff upon the technical ground that he is debarred from bringing this action by section 43 of the Civil Procedure Code.

The plaintiff's claim is for an account and payment of rents and profits of shops at Dar-es Salaam which may have come to his hands, but in Suit No. 193 of 1899 in which I have just given judgment the plaintiff has already sued for rents accruing from the same shops. The only distinction that he can draw between the one claim and the other is that the first was for a part of the rents which had been included in the parties' books and, according to the plaintiff, had been entered as part of a settled account. It appears to me that, if true, this would make no difference because both claims spring from the same cause of action, namely, a declaration by the defendant that he would hold such rents on behalf of the plaintiff, but I am not satisfied that the first sum had ever become part of a settled account. The plaintiff won his first case upon the ground that the defendant had made himself a trustee of these rents for the plaintiff and according to the same principle the plaintiff would succeed in this one, but as he has severed his claim I feel bound to dismiss the action but make no order as to costs.

The plaintiff preferred an appeal.

Scott (Advocate General) with *H. C. Coyaji*, for the appellant (plaintiff).

Setalvad (with *Payne and Company*), for the respondent (defendant).

JENKINS, C. J. :—This is an appeal from the Court of Zanzibar by which the plaintiff's Suit No. 196 of 1899 has been dismissed on the ground that the plaintiff is barred by section 43 of the Civil Procedure Code. The circumstances out of which the suit arises are shortly these : One Khimji Jairam of Cutch traded at Zanzibar through his Munim Lalji Anandji, the present defendant. The plaintiff Lakhmidas Ludha also traded there. To

enable Lalji Anandji on behalf of his principal to obtain a release from attachment of five shops within the German jurisdiction, a sum of Rs. 7,000 was lent by Lakhmidas Ludha to Lalji Anandji, who applied the sum of Rs. 5,869 in discharge of what was due on the attachment and of legal expenses directed by the German Court to be paid. The balance was returned by Lalji Anandji to Lakhmidas Ludha. It became necessary, however, in the opinion of Lakhmidas Ludha to obtain security for repayment of the Rs. 5,869, and accordingly Lalji Anandji became personally responsible for that amount, and as part of the same transaction he got a mortgage in his own favour from Khinji Jairam of the five shops and in turn sub-mortgaged them to Lakhmidas. The result was that there was debited to Lalji Anandji in Exhibit No. 50, the sum of \$2,753. That account was a general one in the name of Lalji Anandji. There being due to the plaintiff Lakhmidas Ludha a considerable balance in this general account, he brought to recover it Suit No. 193 of 1899 against Lalji Anandji, and a few days later he brought the present Suit No. 196 of 1899 for the purpose of enforcing certain rights, which he alleged were vested in him by virtue of the sub-mortgage, Exhibit 38.

In the Suit No. 193 of 1899, the Acting Judge of the Court of Zanzibar passed a decree in the plaintiff's favour. But in the present suit he declined to pass a decree on the ground that section 43 of the Civil Procedure Code stood in his way.

The reasoning of the learned Judge is shortly this. That inasmuch as it was open to the plaintiff to include his claim for rent (as it is called) in the first suit, therefore he had no right to bring in respect of it a second suit. And it is suggested that this becomes apparent from the fact that in the earlier suit is included a sum of Rs. 101 as being an amount due in respect of rent.

Now section 43 is very clear. It says that "every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action"; and "if a plaintiff omit to sue in respect of, or intentionally relinquish, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished." It seems to have been the opinion of the learned Judge that the Suit No. 193, so far as it included that

1904.

HANSRAJ
LAKHMIDAS
v.
LALJI
ANANDJI.

1904.

HANSRAJ
LAKHMIDAS
v.
LALJI
ANANDJI.

item of Rs. 101, was in respect of the same cause of action as Suit No. 196. But there is an obvious fallacy underlying this reasoning. The item of Rs. 101, it is true, arises out of the mortgage transaction which is the subject-matter and the basis of the Suit No. 196, but the real cause of action alleged in the earlier suit is an adjusted account, and the earlier suit, even so far as it related to the item of Rs. 101, was a suit on an account stated. It is well established that an account stated respecting a debt constitutes a new and distinct cause of action, the consideration being the ascertaining of the previously uncertain state of the transaction between the parties, while a promise to pay is implied by the admission of the balance. So that it is clear the claim in respect of the Rs. 101 was not on the mortgage, but on an account stated in respect of the transaction arising out of the mortgage.

In Suit No. 196 the mortgage constitutes a cause of action in itself, and we fail to see how it can be said that a suit for items wholly unconnected with that mortgage (except so far as they may have formed the basis of a claim in respect of the Rs. 101) can in any sense be treated as a suit on the same cause of action.

For these reasons we think that the learned Judge was in error.

But, then, it has been argued by Mr. Setalvad that he is entitled to support the decree on other grounds, and he has accordingly urged that though there was in Exhibit 23 a liability to render an account, there was no liability to pay over what should appear on that account.

Now what are the words of the mortgage? They are these: "I, *i.e.*, the mortgagor, should manage to keep the account of income and expenses thereof, *i.e.*, of the shops, and then furnish the said account to you, and whatever balance there may be, you should credit the same on account of principal and interest." So it is manifest, first, that the mortgagor was under an obligation to keep accounts of the income and expenses; secondly, that he was to furnish the account to the mortgagee; and, thirdly, the mortgagee was to give the mortgagor credit for the balance shown on these accounts; and we are asked to hold that he is to give credit for that balance without receiving it.

It seems to us that the suggestion cannot be entertained for a moment. Though the document is not expressed with precision,

this clause imposes an obligation upon the mortgagor to pay over to the mortgagee the balance in reduction of principal and interest.

We, therefore, think that the decree of the lower Court cannot be sustained, that it must be reversed and the case sent back for decision on the merits.

The appellant to get his costs of the appeal.

Decree reversed.

1904.

HANSAJ
LAKHMIDAS
v.
LALJI
ANANDJI,

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Butt.

SAKUBAI, WIDOW OF VINAYAK RAMKRISHNA (ORIGINAL PLAINTIFF),
APPELLANT, v. GANPAT RAMKRISHNA (ORIGINAL DEFENDANT),
RESPONDENT.*

1904.

March 30.

Civil Procedure Code (Act XIV of 1882), section 592, proviso—Pauper appeal—Leave—Reasons for granting leave to be recorded.

In granting leave to appeal as pauper the Court should be careful to see that the proviso to section 592 of the Civil Procedure Code (Act XIV of 1882) is satisfied.

The Judge or Bench admitting a pauper appeal should express and record very briefly the reasons for granting leave so that the Bench before whom the appeal ultimately comes may have an assurance that the leave was properly given.

APPEAL against the decision of A. G. Bhawe, First Class Subordinate Judge of Poona, in Original Suit No. 242 of 1901.

Admission of appeal *in forma pauperis*.

The plaintiff sued the defendant, who was the brother of her deceased husband, to recover various sums on account of her maintenance, the value of her *stridhan* ornaments, which, she alleged, were in defendant's possession, expenses of pilgrimage and house accommodation. The claim was valued at Rs. 16,800 and there was a prayer in the plaint that the plaintiff's maintenance should be made a charge on the family estate in the defendant's possession.

1904.

SAKUBAI
v.
GANPAT.

The defendant stated (*inter alia*) that he was willing to make a suitable provision for the plaintiff.

The Subordinate Judge passed a decree as follows :—

The decree will be that the defendant do pay to the plaintiff a quarterly allowance of Rs. 120 as a provision for her maintenance and sufficient accommodation in the family house for her residence during her life-time, or in the alternative Rs. 5 monthly as house-rent, and further he shall pay to her arrears of maintenance from 1st January, 1901, to this date at the rate of Rs. 10 per month. The plaintiff's maintenance shall be a charge on a sufficient portion of defendant's immoveable property which shall be specifically ascertained in execution proceeding, the plaintiff not having given sufficient description of it in the plaint. The rest of the plaintiff's claim is rejected.

The plaintiff appealed *in formâ pauperis* and the Court (Crowe and Aston, JJ.), in admitting the appeal passed the following order :—"Leave to appeal *in formâ pauperis* granted. Appeal admitted."

G. S. Rao appeared for the appellant (plaintiff).

Selalvad (with M. B. Chaudal) appeared for the respondent (defendant).

During the hearing of the appeal, the parties came to a compromise and consequently the appeal *in formâ pauperis* was allowed to be withdrawn and the following judgment was delivered by

JENKINS, C. J.—In reference to the withdrawal of this appeal we bear in mind the apparent omission of the admitting Court to observe the provisions of section 592 of the Civil Procedure Code and in particular of the proviso to that section which makes it imperative on the Court "to reject the *application* unless upon a perusal *thereof*, and of the *judgment* and *decree* against which the appeal is made, it sees reason to think that the decree appealed against is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust."

That proviso is a very necessary safeguard introduced by the Legislature for the benefit of litigants who find themselves opposed by paupers, and in our opinion the Court should be careful to see that the proviso is satisfied. It is to be noticed that the Court must come to its conclusion upon a perusal only

of the application, the judgment and the decree. This proviso is apt to be overlooked, but it would provide a safeguard against this if the Judge or Bench admitting a pauper appeal were to express and record very briefly the reasons for granting leave, so that the Bench before whom the appeal ultimately comes may have an assurance that the leave was properly given.

1904.

SAKUBAI
v.
GANPAT.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

SHA CHAMANLAL MAGANLAL AND ANOTHER (ORIGINAL PLAINTIFFS),
APPELLANTS, *v.* DOSHI GANESH MOTICHAND, DECEASED, BY HIS
HEIRS MANEKCHAND GANESH AND OTHERS (ORIGINAL DEFENDANTS),
RESPONDENTS.*

1904.

April 12.

Hindu Law—Gujarāt—Father's father's sister's grandson—Mother's sister's son preferential heir—Moveables inherited by widow—Testamentary power of disposition—Mayukha.

In Gujarāt a mother's sister's son is the preferential heir to a father's father's sister's grandson.

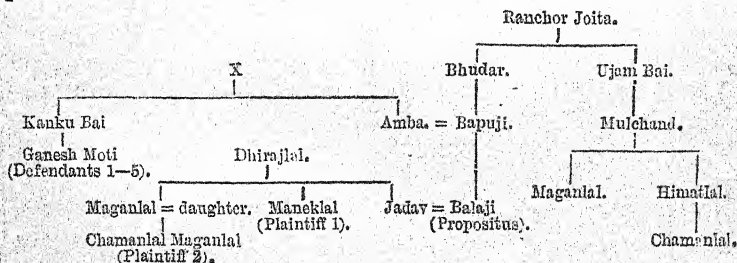
Under the Mayukha a widow has no testamentary power of disposition over moveables which have been inherited by her from her husband.

Gadadhar Bhat v. Chandrabhagabai (1) followed.

APPEAL from the decision of Karpurram M. Mehta, Second Class Additional Joint Subordinate Judge of Ahmedabad, in Original Suit No. 58 of 1901.

Question of preferential heirship according to Hindu Law:

The following genealogical table shows the relationship of the parties :—



* Appeal No. 70 of 1903.

(1) (1892) 17 Bom. 690.

1904,

CHAMANLAL

v.

GANESH

MULCHAND.

Balaji, the propositus, died in 1885-86, leaving him surviving a mother Amba and a widow Jadav. Amba and Jadav died in 1899-1900 at the interval of eight or ten months, the former dying before the latter. Amba had a sister Kanku. Ganesh Moti, father of defendants 1—5, was Kanku's son. He was alive when Jadav died. He was thus Balaji's first cousin (mother's sister's son). Magan was the grandson of Ujam Bai, Balaji's father's father's sister.

The plaintiffs alleged that Bai Jadav (who was the sister of plaintiff 1 and maternal aunt of plaintiff 2) made a will in their favour on the 20th September, 1899, and that on her death they came in possession of her property and books under the will, but did not get the ornaments pledged by her. Subsequently they having applied for a certificate under the Succession Certificate Act (VII of 1899), their application was opposed by Maganlal Mulchand, Chamanlal Himatlal and Ganesh Moti who made counter-applications. Thereupon a settlement was effected between the plaintiffs on one hand and Maganlal and Chamanlal on the other and under the settlement, which was dated January, 1901, the latter assigned to the plaintiffs all their rights as the heirs of the estate of Balaji and Bai Jadav for Rs. 1,500. According to the settlement the Court having passed an order granting the certificate to the plaintiffs, Ganesh Moti appealed and the Appellate Court reversed the order and directed that certificate be granted to Ganesh Moti. The plaintiffs thereupon brought the present suit (1) for a decree that Ganesh Moti, since deceased, father of defendants 1—5, was not the heir of Balaji Bapuji and his widow Bai Jadav; that the plaintiffs were the heirs of Balaji Bapuji and his widow Bai Jadav under the will of Bai Jadav and also under the assignment made by Maganlal and Chamanlal, who claimed to be the heirs of Bai Jadav, and that defendants 1—5 had no right to the estate; (2) for a decree directing the defendants to account for the outstandings realized by them; and (3) for a perpetual injunction restraining the defendants from disturbing their possession of the properties set forth in the plaint and from recovering further outstandings.

The defendants contended, *inter alia*, that the plaintiffs were not the heirs of Balaji; that they could not acquire any rights

under the will of Bai Jadav, who had no authority to will away her husband's estate; that Maganlal and Chamanlal were not the heirs of Balaji and consequently the plaintiffs acquired no right under the assignment.

The Subordinate Judge found that Bai Jadav's will was unauthorized and invalid; that Maganlal and Chamanlal were not Balaji's heirs; that the plaintiffs were not the heirs of Balaji and Bai Jadav, and that the plaintiffs were not entitled to any relief. He, therefore, dismissed the suit, holding that defendants 1—5 being the *Atmabandhus* of the deceased Balaji, they had a preferential right as Balaji's heirs to Maganlal and Chamanlal who were the *Pitribandhus* of the deceased.

Against the decree of the Subordinate Judge, the plaintiffs appealed to the District Court at Ahmedabad (Appeal No. 239 of 1902), but as the case involved purely a question of law and as another appeal between the same parties was pending in the High Court, the appeal in the District Court was transferred to the High Court at the instance of the applicants Shakra Nathu (defendant 9), and another in Civil Application No. 119 of 1903.

G. S. Rao, for appellant 1 (plaintiff 2).

L. A. Shah, for respondent 1 (defendant 1).

N. K. Mehta, for respondent 2 (defendant 6).

JENKINS, C. J.:—Two questions only arise on this appeal; 1st whether in Gujarāt a mother's sister's son or a father's father's sister's grandson is the preferential heir, and 2ndly whether under the Mayukha a widow has a testamentary power of disposition over moveables which have descended to her from her deceased husband.

Both the competing heirs are *bandhus* and the text of the Mayukha by which the descent in this case is governed, is in these terms (see Mandlik's Hindu Law, pp. 82, 83):—

“In default of *Samanodakas* (come) the *Bandhus* (cognate kindred). They (are thus specified) in another *Smṛiti*: ‘The sons of one's own father's sister, the sons of one's own mother's sister, and the sons of one's own mother's brother, are to be reckoned as *Atmabandhus* (one's cognate relations).

1904.

CHAMANLAL
v.
GANESH
MOTICHAND.

1904.

CHAMANLAL
v.
GANESH
MOTICHAND.

The sons of the paternal grandfather's sister, the sons of the father's mother's sisters, and the sons of the father's mother's brothers, are known as the *Pitribandhus* (one's father's cognate kindred). The sons of one's mother's father's father's sisters, the sons of one's mother's mother's sisters, and the sons of the mother's mother's brothers, are known as *Matribandhus* (one's mother's cognate kindred). Here (*i.e.*, among these) the order (of succession) is that stated (in the text).

"(If it be said): 'As the right of the wife and all the rest to inheritance is derived from their relation to the deceased, so let (the right) of the *Bandhavas* be; what title then can the *Bandhavas* of the father or of the mother (of the deceased) have to the wealth? (The texts) beginning with *pituh pitri shwasu putrah*, &c. (the sons of the sister of the father's father, &c.) are only as (denotative of a class) showing the connection between a term and the objects denoted (by it), (and have) no reference to wealth.' The answer (to that) is that the showing the connection between terms and objects denoted (by them) is redundant; because, even without the said text, the word (*viz.*, *Bandhava*) in its primary sense would apply to (those enumerated as) the father's and mother's cognate relations, in the same way (as it does) to the maternal uncle of the father, the paternal uncle of the father, and the like. Hence the text is intelligible only by the acceptation of (the enumerated) paternal and maternal *Bandhus* (cognates) as being *Bandhus* in reference to succession to property. In short, the same (reasoning) applies in regard to the rules for mourning and the like in reference to *Bandhus*."

We find here a threefold division into *Atmabandhus*, *Pitribandhus* and *Matribandhus*, and it is laid down in so many words that the order of succession is that stated in the text.

Three instances of each class are given, but it has been authoritatively decided that they are not exhaustive, but illustrative.

Among the relationships specifically mentioned are a mother's sister's son, and the father's father's sister's son, and of these the first is named in the text as an *Atmabandhu* and the second as a *Pitribandhu*.

If the order of succession is as stated in the text, then it would seem clear that the mother's sister's son is to be preferred; but Mr. Rao has argued that the father's father's sister's son and grandson are really *Atmabandhus* and as they come in on the paternal side, they are to be preferred, and he has adopted the reasoning expounded in Mr. Bhattacharji's interesting commentaries on Hindu Law.

But the point has been determined adversely to him by the Privy Council in *Muthusami Mudaliyar v. Simambedu Muthukumaraswami Mudaliyar*.⁽¹⁾ That no doubt was a decision under the Mitakshara, but, in our opinion, it is equally applicable to the order of succession laid down in the Mayukha.

The next question is as to a widow's powers under the Mayukha to bequeath by will moveables inherited by her from her husband, and here, we think, we are concluded by the decision of the Full Bench in *Gadadhar Bhat v. Chandrabhagabai* ⁽²⁾ where it was held that "the ruling of the Privy Council, that the property inherited by a widow from her husband devolves on his heirs at her death, must have effect given to it throughout the Presidency with regard to the devolution of the moveables so inherited." And as a necessary sequel it was determined that "the widow's power of alienation over the moveables cannot be regarded as including the power of willing them away at her death so as to displace the right of inheritance by her husband's heirs." That case no doubt came from Ahmednagar, but the reasoning on which it proceeds would equally apply to a case governed by the Mayukha, to which reference was actually made.

Therefore the decree must be confirmed with costs. There must be separate sets of costs.

Decree confirmed.

(1) (1896) 19 Mad. 405.

(2) (1892) 17 Bom. 690 at p. 711.

1904.

CHAMANLAL

v.
GANESH
MOTICHAND.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

1904.
April 13.

DAYARAM JAGJIVAN (ORIGINAL DEFENDANT), APPELLANT, v.
GOVARDHANDAS DAYARAM (ORIGINAL PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act XIV of 1882), sections 278—283, 622—Execution of decree—Order—Appeal—Order passed without jurisdiction—Grounds for non-interference in extraordinary jurisdiction.

An order passed under section 280 of the Civil Procedure Code (Act XIV of 1882) is not appealable.

Where the order of the lower Appellate Court was passed without jurisdiction the High Court declined to interfere under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) on the ground that the plaintiff, to whom relief was granted by the lower Appellate Court, would, if the application were allowed, be obliged to bring a suit to establish the right which he claimed to the property in dispute, after the expiry of the period of limitation within which he was entitled to bring that suit.

SECOND APPEAL from the decision of R. S. Tipnis, District Judge of Thána, reversing the order of M. J. Yajnik, Subordinate Judge of Dahanu, in an execution proceeding.

The plaintiff obtained a money decree, No. 17520 of 1900, in the Court of Small Causes at Bombay against the defendant and four others. The decree was sent to the Court of the Subordinate Judge of Dahanu for execution and the lands and houses mentioned in the application for execution, *darkhast* No. 331 of 1901, were attached. Thereupon, the defendant, one of the judgment-debtors, applied to raise the attachment on the ground that the said property did not belong to him personally, but he was merely a trustee in possession, the property being assigned to religious purposes towards which the income was devoted and therefore the said property was not liable to attachment and sale.

The plaintiff (decree-holder) replied that he was not aware of the assignment; that the property was not used for charitable purposes; that the judgment-debtors were the owners of it and received the income thereof, and that the deed of assignment, if proved, was a fraudulent and colourable transaction.

* Second Appeal No. 479 of 1903.

The Subordinate Judge held that the applicant had settled upon himself the property in question as trustee for charitable purposes. He, therefore, removed the attachment.

On appeal by the plaintiff the Judge reversed the order holding that though the assignment to religious purposes was proved, it was made with intent to defraud or defeat or delay the defendant's creditors; that the transfer was voidable at the option of the plaintiff, and that the property was liable to attachment and sale in execution of the plaintiff's decree.

The defendant preferred a second appeal.

D. W. Pilgaumkar, for the appellant (defendant):—Our first contention is that the order of the first Court releasing the property from attachment was passed under section 280 of the Civil Procedure Code and an order passed under that section is not appealable under section 283 of the Code. The Judge had therefore no jurisdiction to entertain the appeal.

[JENKINS, C. J.:—If so, how can you come up here in second appeal?]

There are precedents of the Calcutta Courts.

[JENKINS, C. J.:—Section 283 is quite explicit.]

We beg permission to convert the second appeal into an application under the extraordinary jurisdiction (section 622 of the Civil Procedure Code) and contend that the order of the first Court being conclusive, the Judge had no jurisdiction to hear the appeal.

R. R. Desai for the respondent (plaintiff) was not called upon.

JENKINS, C. J.:—A decree having been passed against certain defendants, of whom the present appellant was one, the respondent in this appeal applied for the attachment of certain property and an order was passed in his favour. Thereupon, Dayaram, the present appellant, applied to raise this attachment, not as judgment-debtor, but as the representative of a *sadavrat*, to whom he said this property belonged. It is clear, therefore, that he set up no personal right in himself, and it follows that the application was one to which section 278 of the Code of Civil Procedure and the sections that immediately follow it apply.

1904.

DAYARAM
v.
GOVARDHAN-
DAS.

1904.

DAYARAM
v.
GOVARDHAN-
DAS.

The Court before whom the application came decided in Dayaram's favour.

The plaintiff thereupon appealed, and the District Court decided in his favour: now a second appeal is brought here. But this second appeal will not lie on the appellant's own showing, because his first objection is that the lower Court ought to have held that no appeal lay in this case. That objection in our opinion is a sound one. Accordingly we have allowed the appellant to take the only course properly open to him, and have allowed this appeal to be treated as an application to us under section 622 of the Civil Procedure Code, and what we have to decide is whether so treating this proceeding we ought to set aside the order of the District Judge.

We are of opinion that it was passed without jurisdiction; but the present appellant took no such objection before the District Court and if we were now to set aside the order of the District Court, it would have the effect of placing the present respondent in the position of being obliged to bring a suit to establish the right which he claims to the property in dispute though the period within which he was entitled to bring that suit has elapsed; in other words we should be placing him under an obligation to bring a suit that, *prima facie*, would be barred by article 11 of the Limitation Act. No doubt the Court before whom that suit might come might be disposed to excuse delay, but we can give Mr. Desai's client no assurance that this would be the result, and under the circumstances we think it would be unjust to the respondent to set aside the order of the District Court. The result of our declining to interfere is obviously the lesser of the two evils, because as far as we can at present see the appellant before us will not be met by any plea of limitation which would, unless excused, be a bar in the way of a suit by the respondent, though on this we refrain from expressing any positive opinion.

Accordingly, treating this as an application for our interference under section 622 of the Code, we dismiss it, with costs.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

ANANDIBAI, WIDOW OF SADASHIV JIVANRAV (ORIGINAL PLAINTIFF),
APPELLANT, v. KASHIBAI, WIDOW OF JIVANRAV SHAMRAV (ORIGINAL DEFENDANT 1), RESPONDENT.*

1904.

April 13.

Hindu Law—Adoption—Co-widows—Estate vested in one co-widow by inheritance from her son—Adoption by the other co-widow.

A co-widow cannot make an adoption without the consent of the other co-widow in whom by inheritance from her son the whole estate had become vested.

Rakhmabai v. Radhabai ⁽¹⁾, distinguished.

Semble, the consent of the other co-widow would not validate the adoption.

APPEAL from the decision of Vaman M. Bodas, First Class Subordinate Judge of Sātara, in Original Suit No. 429 of 1900.

One Jivanrav Shamrav Pasare died in or about the year 1855, leaving him surviving two widows, Lakshmibai and Kashibai, an infant son Ramrav by Kashibai, and a daughter Vithabai by Lakshmibai. Some months after Ramrav died. In 1875 Lakshmibai, without the consent of her co-widow Kashibai, adopted a boy Sadashiv, who died in 1883 leaving a widow Anandibai. After Lakshmibai's death in 1889, Sadashiv's widow Anandibai brought the present suit against Kashibai and Vithabai to recover possession of certain properties, alleging that they belonged to her as the widow of Sadashiv who was the adopted son of Jivanrav Shamrav Pasare.

The defendants contended, *inter alia*, that Jivanrav died leaving a son Ramrav who succeeded to his entire estate; that after Ramrav's death the succession devolved on his mother Kashibai alone, the junior widow of Jivanrav; that Lakshmibai, therefore, could not and did not adopt the plaintiff's husband Sadashiv; that she had no authority from Jivanrav to adopt, and that the alleged adoption having been made without Kashibai's consent was invalid and did not give the adopted boy any interest in Jivanrav's estate.

* Appeal No. 76 of 1903.

(1) (1868) 3 Bom. H. C. R. (A. C. J.), 181.

1904.

ANANDIBAI
v.
KASHIBAI.

The Subordinate Judge dismissed the suit holding that the plaintiff's husband Sadashiv was not lawfully adopted by Lakshmi-bai; that Lakshmi-bai was incompetent to adopt a son for Jivanrav; that Jivanrav's son Ramrav was his legal heir and representative in whom the whole property of Jivanrav vested, and that after Ramrav's death, his mother, defendant 1, was the rightful heir and successor to his property.

The plaintiff having appealed,

K. H. Kelkar appeared for the appellant:—In the Bombay Presidency the senior widow has a preferential right to adopt a boy to her husband: *Rakhmabai v. Radhabai*.⁽¹⁾ This ruling is affirmed in *Padajirav v. Ramrav*.⁽²⁾ The rule in *Mussumat Bhoobun Moyee Debia v. Ram Kishore Acharg* ⁽³⁾ that a person in whom the estate of the last male holder is not vested cannot adopt, is modified by various exceptions. The mother's case is an instance in point: *Payapa v. Appanna*.⁽⁴⁾ The said rule is in fact a creation of modern law, and with respect to it nothing is found either in the Mitakshara or the Mayukha. The ruling of the Calcutta High Court in *Faizuddin Ali Khan v. Tincowri Saha* ⁽⁵⁾ is distinguishable on the ground that in Bengal the senior widow has no preferential right like the one conceded to her in Bombay. In the present case even Kashibai can adopt to her husband and divest the estate which she has inherited from her son: *Amara v. Mahadgauda*.⁽⁶⁾ The test for the validity of an adoption does not consist solely in the doctrine of the divesting of the estate. In a case like the present, the test is to be found in seniority. We rely on the ruling in *Rakhmabai v. Radhabai* ⁽¹⁾ in support of our contention. See also Golapchandra Sarkar on Adoption, p. 412.

Kashibai having consented to the adoption of Sadashiv, her consent cured the invalidity: *Rupchand Hindumal v. Rakhmabai*.⁽⁷⁾

(1) (1868) 5 Bom. H. C. R. (A. C. J.), 181.

(2) (1888) 13 Bom. 160.

(3) (1865) 10 Moo. I. A. 279.

(4) (1898) 23 Bom. 327.

(5) (1895) 22 Cal. 565.

(6) (1896) 22 Bom. 416.

(7) (1871) 8 Bom. H. C. R. (A. C. J.), 114.

Mahadev V. Bhat appeared for the respondents (defendants) :— The last male holder was Ramrav from whom inheritance is to be traced. On his death his mother succeeded by right of inheritance. * The present is not a case of contest between two widows. Ramrav's birth effected a great change in the legal position of the two ladies. It reduced Lakshmibai to the position of a widow entitled to maintenance only. It was strictly by right of inheritance that Kashibai succeeded to her son Ramrav on his death, as if he had been a separated householder. There was no undivided family at Ramrav's death into which an adopted son could be admitted by virtue of adoption. In an undivided family where deceased co-parceners have left widows, it may plausibly be argued that any widow may continue the existence of the joint family by making an adoption. But the present is strictly a case of inheritance.

It is established by a series of decisions that an estate vested by inheritance in any person cannot be divested by subsequent adoption to a person other than the person from whom the estate vested : *Faizuddin Ali Khan v. Tincowri Saha*, ⁽¹⁾ *Mondakini Dasi v. Adinath Dey*. ⁽²⁾ The real effect of the ruling in *Mussumat Bhoobun Moyee v. Ram Kishore* ⁽³⁾ was considered in a subsequent litigation relating to the same estate. The High Court of Bengal held that Ram Kishore's adoption was not altogether invalid, but that the only result of the previous decision was that he could not inherit the estate in the lifetime of Bhoobun Moyee. On appeal the Privy Council held that on the death of Bhavani Kishore and the vesting of his estate in his widow Bhoobun Moyee, the power of adoption which Bhavani Kishore's mother possessed came to an end and became incapable of execution : *Pudma Coomari Debi v. The Court of Wards*. ⁽⁴⁾ Further, the reasoning in *Ramkrishna Ramchandra v. Shamrao Yeshwant* ⁽⁵⁾ supports our contention. It was there held that the limit to the period within which an adoption may be made by a widow to her deceased husband did not depend upon the mere vesting of the estate in her at any time. The rule stated there, as deducible from previous decisions, is that

1904.

ANANDIBAI
v.
KASHIBAI.

(1) (1895) 22 Cal. 565.

(3) (1865) 10 Moo. I. A. 279.

(2) (1890) 18 Cal. 69.

(4) (1881) 8 I. A. 229.

(5) (1902) 26 Bom. 526.

1904.

ANANDIBAI
v.
KASHIBAI.

when a Hindu dies and his line is continued by a son, his widow cannot adopt. Her power having become extinct cannot be revived : *Gurdappa v. Girimallappa*,⁽¹⁾ *Amaba v. Mahadgauda*,⁽²⁾ *Payapa v. Appanna*,⁽³⁾ *Keshav Ramkrishna v. Govind Ganesh*,⁽⁴⁾ *Venkappa Bapu v. Jivaji Krishna*.⁽⁵⁾

JENKINS, C. J. :—The plaintiff sues to recover possession of the properties described in the plaint, as the widow of Sadashiv, who, she alleges, was the adopted son of Jivanrav Shamrav Pasare. The defendants assert that in the circumstances no adoption could be made.

Jivanrav died over 40 years ago, leaving two widows, Lakshmibai and the defendant Kashibai, a son named Ramrao, and a daughter named Vithabai. The daughter was the child of the elder widow Lakshmibai, the son was the child of the younger widow Kashibai.

Ramrao died and his mother thereupon succeeded to the estate. In 1875, Lakshmibai purported to adopt Sadashiv, the plaintiff's husband, as son to her deceased husband, and the principal question in the case is whether she had power to make that adoption.

Mr. Kelkar for the plaintiff has argued that Lakshmibai was entitled to make the adoption, resting his contention mainly on the decision in *Rakhmabai v. Radhabai*,⁽⁶⁾ where it was held that an elder Hindu co-widow had power to adopt a son to her deceased husband without the consent of the younger widow.

There, however, the two widows had succeeded on the death of their husband as his co-heiresses.

A petition of appeal to the Privy Council from the decree in that suit is said to have been presented, but it was not prosecuted to a hearing and the decision has since been recognized both here and in Calcutta. Still it has been said by a Full Bench of this Court that they did not feel themselves at liberty to carry the authority of that case beyond what its facts actually warrant.

(1) (1894) 19 Bom. 331.

(2) (1896) 22 Bom. 476.

(3) (1898) 23 Bom. 327.

(4) (1884) 9 Bom. 94.

(5) (1900) 25 Bom. 806.

(6) (1863) 5 Bom. H. C. R. (A. C. J.), 181.

1904.

ANANDIBAI

P.
KASHIBAI.

And in Calcutta it has been held in circumstances undis-
tinguishable from the present that an adoption could not be
made without the consent of the co-widow in whom by inherit-
ance from her son the whole estate had vested *Faizuddin
Ali Khan v. Tincowri Saha.*⁽¹⁾

It was there pointed out that no express consent to the
adoption had been given by the co-widow, and that as she had
inherited the property not from her husband, but from her son,
it would be going too far to hold that she was under any such
obligation to give her assent to the adoption by her co-widow as
should have the effect of divesting her of her estate.

These remarks, with which we fully agree, are precisely
applicable to the circumstances of this case. For here, too, there
is no evidence of an express consent, nor do the circumstances
justify the inference that Kashibai gave her consent to an adop-
tion, which would divest her of the estate she had inherited
from her son.

Had we been able to hold that Kashibai had consented, it
would have been necessary to consider whether it would have
been of any avail, for if the decision of the Full Bench in
Ramkrishna Ramchandra v. Shamrao Yeshwant⁽²⁾ were applicable
here, Lakshmbai's power to adopt was at an end and no assent
would be of use.

The result is that we must confirm the decree with costs.
The appellant to pay the court-fees which she would have had to
pay if she had not been permitted to sue as a pauper.

Decree confirmed.

(1) (1895) 22 Cal. 565.

(2) (1902) 26 Bom. 526; 4 Bom. L. R. 315.

APPELLATE CIVIL.

Before Mr. Justice Crowe and Mr. Justice Chandavarkar.

LALCHAND MOTIRAM AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS,
v. LAKSHMAN SAHADU (ORIGINAL PLAINTIFF), RESPONDENT.*

1904.

April 15.

Transfer of Property Act (IV of 1882), sections 54, 56 (6) (b)—Contract of sale—Deed of sale not registered—Rights and remedies of the contracting parties.

The plaintiff executed a conveyance of immoveable property of the value of upwards of Rs. 100 which was not registered according to law, received the purchase-money and delivered possession of the property to the vendee (defendant 1). For a specific performance of this contract, the defendant 1 brought a suit which was dismissed. The plaintiff then sued to recover the possession of the property as its owner.

Held, that the suit should be decreed in plaintiff's favour and that all that the defendant 1 was entitled to was the benefit which he could claim under section 56 (6) (b) of the Transfer of Property Act (IV of 1882).

Karalia Nanubhai v. Mansukhram () explained.

SECOND APPEAL from the decision of F. X. DeSouza, Acting District Judge of Khándesh, confirming the decree passed by V. N. Rahurkar, Subordinate Judge at Bhusáwal.

Suit to recover possession of land.

On the 13th March, 1898, the plaintiff sold Survey Nos. 318, 385 to defendant 1 in consideration of a previous debt of Rs. 300, and put him into possession of the fields; but the sale-deed was not registered as required by section 54 of the Transfer of Property Act (IV of 1882).

The plaintiff brought Suit No. 168 of 1901 to recover possession of the said fields, alleging that he had leased them to defendant 1 for a period of three years. This suit was dismissed on the 24th June, 1902.

The defendant thereupon brought Suit No. 9 of 1902 for specific performance and execution of a valid conveyance. This suit was dismissed as time-barred on the 12th March, 1903.

The plaintiff then instituted the present suit to recover the possession of the fields as owner. Defendant 2 was made a

* Second Appeal No. 726 of 1903.

(1) (1900) 24 Bom. 400; 2 Bom. L. R. 220.

party as he was in possession of Survey No. 385 as purchaser from defendant 1.

The Subordinate Judge decreed the suit in the plaintiff's favour, and passed the following order :—

Plaintiff do recover possession of Survey No. 318 from defendant 1 and Survey No. 385 from defendant 2. Defendant No. 1 is entitled to get Rs. 300 and interest on this sum at Rs. 12 per cent. per annum from the 13th March, 1898, till the delivery of possession to plaintiff. During the same period he is liable to render the account of profits to plaintiff. If there be any balance in favour of defendant No. 1 he shall have a charge on the disputed lands in respect of it.

This decree was on appeal confirmed by the District Judge whose reasons were as follows :—

Under section 54 of the Transfer of Property Act, a registered sale-deed is essential for the transfer of ownership, and in the absence of such sale-deed, the ownership still vests in the vendor, who is therefore entitled to recover possession from the vendee, defendant 1 (*vide Papireddi v. Narasareddi*, I. L. R. 10 Mad. 465). Mr. Khare argues that a rigid application of section 54 to the present case operates as a great hardship to defendant and that the equities between the parties require that they should be left *in statu quo*; or that at any rate, plaintiff coming into Court should have done so with clean hands with an offer to repay the purchase-money Rs. 300 and not with a false case based on a fictitious lease. This argument would no doubt have been sound in the English Courts where the vendee is entitled to say that the property belongs to him as from the date when the contract is capable of being enforced specifically—see *Edward v. West*, 7 Ch. D. 858. But in this country, the Legislature, both in the Transfer of Property Act and in the Trusts Act, has abrogated the doctrine of equitable ownership. The contract for sale, it is expressly provided by section 54, does not create any interest in or charge on the land in favour of the vendee.

But the vendee is, however, not without his remedy for the purchase-money which he has paid in advance. Section 55, clause (b), creates a charge on the property in his favour to the amount of the purchase-money with interest, and the Subordinate Judge has in this case rightly declared such charge to exist in favour of defendant 1. True consideration was not paid in cash; but the antecedent debt has been wiped off, and this is equivalent to the payment of purchase-money within the meaning of section 55 (b), and this charge which is known to English lawyers as the vendee's lien for prematurely paid purchase-money, is enforceable in every case when as in this case the purchase goes off through no fault of the purchaser—*Dinu v. Grant*, 5 De G. and Sm. 451.

1904.

LALCHAND
v.
LAKSHMAN.

The defendants appealed to the High Court contending, *inter alia*, that the lower Appellate Court erred in holding that the plaintiff continued to be the owner of the lands in dispute, although he had received the consideration and had transferred the possession of the same to defendant No. 1 according to the contract of sale; and that the Court erred in assuming that the provisions of section 54 of the Transfer of Property Act were exhaustive, and that the doctrine of equitable ownership had been abrogated by the said section.

L. A. Shah, for the defendants (appellants):—The plaintiff had received the full consideration and had transferred the possession of the lands to defendant No. 1 according to the contract of sale. The provisions of section 54 of the Transfer of Property Act (IV of 1882) are not exhaustive. The doctrine of equitable ownership has not been abrogated by that section. Equitable ownership passed to defendant 1. See the case of *Karalia Nanubhai v. Mansukhram* ⁽¹⁾, which is followed in *Ram Bakhsh v. Mughlani Khanam*. ⁽²⁾ A vendor who has given possession to the purchaser is not entitled to rescind the contract of sale and recover possession because the purchase-money is not paid: *Trimalrav v. The Municipal Commissioners of Hubli*. ⁽³⁾ Though there is no registered conveyance, yet as we are defendants in possession, we are entitled to rely on our possession in defence to a suit for the plaintiff for possession. The Court ought to take an equitable view of the rights of the parties. The plaintiff's suit for possession must be dismissed.

S. S. Patkar, for the respondent (plaintiff):—In *Karalia Nanubhai v. Mansukhram* ⁽¹⁾ a registered conveyance was subsequently executed so that the purchaser's title was perfected. Under clause 2 of section 54 of the Transfer of Property Act (IV of 1882) the ownership in the case of tangible immoveable property of the value of Rs. 100 and upwards can pass only by a registered instrument. The important fact in the present case is that defendant No. 1 brought a suit (No. 9 of 1902) for specific performance and execution of a valid conveyance, but

(1) (1900) 24 Bom. 400; 2 Bom. L. R. 220. (2) (1904) 24 Allahabad Weekly Notes 8.

(3) (1878) 3 Bom. 172.

it was dismissed as being time-barred on the 12th March, 1903. Defendant No. 1 is bound by the decree in that suit. He has failed in his suit for specific performance and therefore is in possession practically without any defence to the plaintiff's suit. Under similar circumstances the Madras High Court has held in *Papireddi v. Narasareddi* ⁽¹⁾ that the sale was not complete and possession could not take the place of the registered deed required by section 54. It has been held in *Ramasami Pattar v. Chinnan Asari* ⁽²⁾ that "the Transfer of Property Act in so far as it insists upon registration as essential to certain transfers in addition to a written instrument goes further than the Statute of Frauds, the policy of the Indian Legislature being gradually to secure a public register of title to landed property. Under the English Law a covenantor has an equitable title or interest in the property; but under the Transfer of Property Act, the covenant does not itself create any interest in or charge on the property." The deed not being registered, the sale-deed is inadmissible to prove the sale and does not affect immoveable property comprised therein, and oral evidence is inadmissible to prove the sale. The defendant's suit for specific performance being dismissed, he is practically without any defence and plaintiff is entitled to possession. Defendant No. 1 is entitled to the relief given by the lower Courts, *viz.*, that under section 55 (6) (b) of the Transfer of Property Act he is entitled to a charge on the property to the extent of the purchase money.

L. A. Shah, in reply:—The case in *Papireddi v. Narasareddi* ⁽¹⁾ was cited in the argument of the case of *Karalia Nanubhai v. Mansukhram* ⁽³⁾, but it was not followed. In the latter case, it was held that from September, 1893, Jivanlal was nothing more than a bare trustee and had no attachable interest. The subsequent execution of a registered conveyance was not a ground of decision in the case. The fact that the suit of defendants for specific performance was dismissed as time-barred is not material because the defendant's defence is not barred. The remedy may be barred but the right subsists and defendant No. 1 can successfully plead his title and possession under the sale-deed to the plaintiff's present suit.

(1) (1892) 16 Mad. 464.

(2) (1901) 24 Mad. 449 at p. 462,

(3) (1900) 24 Bom. 400; 2 Bom. L. R. 220.

1904.

LALCHAND
v.
LAKSHMAN.

CHANDAVARKAR, J. :—The argument of Mr. Shah in support of this second appeal is based mainly upon the support which he seeks to derive from the decision of this Court in *Karalia Nanubhai v. Mansukhram*.⁽¹⁾ But that decision is clearly distinguishable from the present case. The facts there were that the vendor had not only received the purchase money and delivered the property, but had perfected the title of the vendee by a registered conveyance as required by clause 2 of section 54 of the Transfer of Property Act. Under these circumstances the learned Chief Justice of this Court, who delivered the judgment, held that there were two things in favour of the vendee, one that at the date of the attachment of the property by a third party as the property of the vendor, the vendee had a lien on the property for the amount of his purchase money paid to the vendor, the other that the subsequent execution and registration of the sale-deed perfected the vendee's title, and that such title related back to the date when before the attachment the vendor had agreed to sell the property. Moreover, in that case the vendee had obtained a decree for specific performance against the vendor. In the present case the facts, on the other hand, are that the vendor received the purchase money, delivered the property to the vendee and executed a conveyance which, however, cannot be admitted in evidence because it is not registered as required by law. The period for registration has expired and, besides, the suit for specific performance brought by the vendee has been rejected. The decree in that suit is binding upon the parties. All that, therefore, the vendee can claim is the benefit of section 56 (6) (b) of the Transfer of Property Act. The decision in *Karalia Nanubhai v. Mansukhram*⁽¹⁾ is so far but no further in his favour, and that benefit he has got under the decree of the lower Court. The Allahabad decision in *Ram Bakhsh v. Mughlani Khanam*⁽²⁾ no doubt applies to a state of facts not dissimilar to the present, but the judgment shows that the Court there simply followed the decision of this Court in *Karalia Nanubhai v. Mansukhram*⁽¹⁾ as an authority which had gone the length of deciding that where there is a contract of sale followed by delivery of property and receipt of purchase money by the

(1) (1900) 24 Bom. 400; 2 Bom. L. R. 220.

(2) (1904) 24 All. W. N. 8.

vendor, a registered deed of conveyance is not necessary to pass ownership to the vendee, though clause 2 of section 54 of the Transfer of Property Act says that ownership can pass only by such a deed and not otherwise in the case of tangible immoveable property of one hundred rupees and upwards. The decision in *Karalia Nanubhai v. Mansukhram* ⁽¹⁾ does not go and was not intended to go that length; nor was it necessary for the purposes of that decision to do so since there was a registered conveyance in the case. Were we to follow the Allahabad decision, we should be overriding the plain provisions of the Transfer of Property Act.

But then it is further urged by Mr. Shah that though there is no registered conveyance to give his client a title by sale, yet as he is a defendant in possession he is entitled to rely on it in defence, and that the Court ought to take an equitable view of his rights. But the question is: What are his rights? The Legislature says in plain terms that in such a case he has no right of ownership but only a lien for his purchase money; and such a right cannot be extended unless the defendant brings his case within the principle of estoppel against the plaintiff, but no estoppel is pleaded or suggested. Nor is there any equity in defendant's favour, for he could have himself got the deed registered, the plaintiff having executed it. This contention can be allowed, if at all, on the principle of part performance, as to which the decisions of the Courts of law in England have been, under the Statute of Frauds, that though there be no writing as required by the Statute, yet if there has been part performance of a parol contract, a Court of equity will assist the person who has got into possession under that contract. But that principle proceeds upon the fact as pointed out by Lord Selborne in *Maddison v. Alderson* ⁽²⁾ "that the 4th section of the Statute of Frauds does not avoid parol contracts but only bars the legal remedies by which they might otherwise have been enforced." As said by Lord Ellenborough cited there by Lord Selborne, "the statute does not expressly and immediately vacate such contracts, if made by parol; it only precludes the bringing of

1904.

LALCHAND
v.
LAKSHMAN.

(1) (1900) 24 Bom. 400; 2 Bom. L. R. 220.

(2) (1888) 8 App. Cas. 467 at pp. 474, 475.

1904.

LALCHAND
v
LAKSHMAN.

actions to enforce them." But the Transfer of Property Act provides otherwise and says that no title of ownership can be created to tangible immoveable property of Rs. 100 and upwards in any other manner than by a registered conveyance. That excludes all considerations of equity based on part or whole performance and makes the law laid down in the Act applicable whether a vendee is suing or is sued.

We must, therefore, confirm the decree with costs.

Decree confirmed.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Batty.

1904.

June 8.

MOHOLAL MAGANLAL SHA (ORIGINAL DEFENDANT), APPELLANT v
BAI JIVKORE (ORIGINAL PLAINTIFF), RESPONDENT.*

Damage—Trenches for foundations—Percolation of rain-water through the trenches—Injury to the neighbouring house.

The defendant dug a trench on his land for the foundation of a superstructure on his land. This trench was close to, and in a line with, the back wall of the plaintiff's house. The rain-water collected in the trench and percolating into the foundations of the plaintiff's house, caused the back wall of the plaintiff's house to subside and caused other damage. The plaintiff brought a suit to recover damages.

Held (1), that the defendant had a right to build on his land and for the purpose of building to make ditches for foundations.

(2) that the effective cause of the damage being the percolation of the rain-water which collected in the trenches and caused the shrinkage of the house, the defendant was not liable.

Before a person can be held liable in damages for injury caused to his neighbour's land by water either flowing from the former's land to the latter's or percolating from the one into the other, it must be shown that the water was brought or collected on his land by him voluntarily for his own purposes in a non-natural user of it. Otherwise, he is not liable.

SECOND APPEAL from the decision of P. E. Percival, Joint Judge of Ahmedabad, confirming the decree passed by Vadilal T. Parekh, Joint Subordinate Judge at Ahmedabad.

Suit to recover damages.

* Second Appeal No. 562 of 1903.

1904.

MOHOTAL

C.
BAT

JIVKORE.

The plaintiff owned a house in Laxminarayan's Pole in Ahmedabad. To the east of this house was a house belonging to a temple of which the defendant was the manager. The defendant pulled down this house in June, 1900, and made trenches in September, 1900, for the foundations of the building to be erected on the land. The plaintiff's complaint was that by reason of water and concrete in these foundations, the eastern and southern walls of her house were weakened. One of the trenches for foundation was in a straight line with the back wall of the plaintiff's house; on the 22nd September, 1900, while this second trench was so open, it rained, the rain-water of the street collected in the trench, and percolating thence to the plaintiff's land caused shrinkage of the plaintiff's house. A portion of the back wall of the plaintiff's house fell down, the eastern wall cracked, and a portion of the ground floor gave way. This suit was, therefore, brought to recover Rs. 1,000 as damages.

The defendant contended (*inter alia*) that no part of the plaintiff's house suffered damage on account of his (defendant's) act or negligence; that necessary precautions were taken in digging the foundations, and that the plaintiff's house was old and weak and had cracks.

The Subordinate Judge held that the acts complained of were committed by the defendant, and that damage was caused to the plaintiff's house by defendant's negligence. He, therefore, awarded Rs. 500 as damages to the plaintiff. On appeal this decree was confirmed.

The defendant appealed to the High Court contending (*inter alia*) that the lower Appellate Court was wrong in ignoring the fact that the defendant was acting quite within his rights in having the foundations dug for the new building; that he had in no way transgressed any duty imposed upon him by law in raising a new building; that the lower Appellate Court had omitted to consider the point that the defendant had taken sufficient care to keep the rain-water from the foundations, and that he was guilty of no negligence.

L. A. Shah (with the Advocate General), for the defendant (appellant):—The first point in the case is that the plaintiff has no cause of action against us. The defendant was using his

1904.

MOHOLAL

v.

BAI
JIVKORE.

property in a natural and legitimate manner, and was entitled to dig foundations on his own land for building purposes. He owned no duty to the plaintiff; and the plaintiff even does not complain of any breach of duty on his part. The defendant is not responsible for damages resulting from the percolation of rain-water accumulating in his foundations which is no act of his: see *Wilson v. Waddell* ⁽¹⁾ in which reliance is placed on *Rylands v. Fletcher*, ⁽²⁾ *Popplewell v. Hodgkinson*, ⁽³⁾ and *Chadwick v. Trower*. ⁽⁴⁾

Secondly, the lower Appellate Court has recorded no finding as to our negligence. There is evidence in the case to show that we had taken proper precautions to prevent rain-water from getting into our foundations, which the Appellate Court has not considered at all, and even assuming that the defendant owned any duty to the plaintiff, then unless it were found that the defendant had been negligent, he could not be held liable for the results of natural percolation of rain-water on the plaintiff's land through foundations dug on defendant's land.

G. S. Rao, for the respondent (plaintiff):—In this case, the Municipality of Ahmedabad had given a warning to the defendant to finish his buildings before the monsoon. Instead of doing so, he dug these trenches in September, 1900; and he left them open. The trench running north to south was filled up in such a way as to have weakened our building. When on the night of the 22nd September, 1900, it rained, the other trench was open and no precautions were taken to prevent the rain-water which had accumulated in the street from getting into the trench. As a matter of fact the whole trench got filled with rain-water which percolated and caused the damage complained of. Both the lower Courts have held that the damage has resulted from the percolation of rain-water. Under these circumstances the defendant was obviously responsible, as it was his act that brought about the accumulation of rain-water which resulted in the percolation of the water on to our land. The defendant was bound to use his property in such a careful way as not to cause any damage to his

(1) (1876) 2 App. Cas. 95.

(3) (1869) L. R. 4 Exch. 248.

(2) (1868) L. R. 3 H. L. 330.

(4) (1839) 8 L. J. Exch. 286.

neighbour: see *Vithaldas v. The Municipal Commissioner of Bombay*.⁽¹⁾ Though the lower Appellate Court has not recorded any express finding as to the defendant's negligence, the first Court has expressly found it and the lower Appellate Court has practically adopted that finding. The finding of the first Court about defendant's negligence does not appear to have been specifically questioned by the defendant in the lower Appellate Court. The defendant has all along acted with his eyes open without any regard to his neighbour's rights and ought to be held liable for the consequences.

The Advocate General, in reply:—The case of *Vithaldas v. The Municipal Commissioner of Bombay* ⁽¹⁾ has no application. The remarks of Lord Bramwell in *Bamford v. Turnley* ⁽²⁾ show what is a natural user of one's property. The principle of the case of *Wilson v. Waddell* ⁽³⁾ ought to govern the present case.

CHANDAVARKAR, J.:—The facts necessary for the disposal of this second appeal are practically admitted [and moreover both the Courts below agree in their findings as to those facts. The plaintiff (who is the respondent before us) complains that the defendant has caused damage to her house by allowing the rain-water collected into a trench dug by the defendant on his land to percolate into the foundations of her house. The defendant admits that he did dig, but his defence is that as it was done in the natural user of his property, he is not liable for damage done to the property of the plaintiff by percolation. This defence, we think, must succeed under the circumstances of this case. The defendant had a right to build on his land and for the purpose of building to make ditches for foundations. It is not the case of the plaintiff that the defendant dug the foundations of his new building in such a way as to occasion damage to, or accelerate the fall of, her house. The effective cause of the damage is the percolation of the rain water, which collected in the trenches and caused the shrinkage of her house. It is no doubt the law that "if a man brings or uses a thing of a

(1) (1902) 4 Bom. L. R. 914.

(2) (1862) 3 B. & S. 62 at p. 82.

(3) (1876) 2 App. Cas. 95.

1904.

MCHOLAL

v.

BAI

JIVKORE.

dangerous nature on his own land, he must keep it in at his own peril and is liable for the consequences if it escapes and does injury to his neighbour." This is the principle of *Rylands v. Fletcher* ⁽¹⁾ which, in the opinion of the Judicial Committee of the Privy Council in *Madras Railway Co. v. The Zemindár of Carratzenagarum* ⁽²⁾ affords a rule applicable to circumstances of the same character in India. In that case Lord Cairns made these observations:—"The defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used; and if, in what I may term the natural user of that land there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place" (page 333). Lord Cranworth, referring to the maxim *sic utere tuo ut alienum non lædas*, says in his judgment that it is well illustrated by two cases—*Smith v. Kenrick* ⁽³⁾ and *Baird v. Williamson*. ⁽⁴⁾ "In the former the owner of a coal mine on the higher level worked out the whole of his coal, leaving no barrier between his mine and the mine on the lower level, so that the water percolating through the upper mine flowed into the lower mine, and obstructed the owner of it in getting his coal. It was held that the owner of the lower mine had no ground of complaint." In *Baird v. Williamson* ⁽⁴⁾ "the defendant, the owner of the upper mine, did not merely suffer the water to flow through his mine without leaving a barrier between it and the mine below, but in order to work his own mine beneficially he pumped up quantities of water which passed into the plaintiff's mine in addition to that which would have naturally reached it, and so occasioned him damage. Though this was done without negligence, and in the due working of his own mine, yet he was held to be responsible for the damage so occasioned." ⁽⁵⁾

⁽¹⁾ (1868) L. R. 3 H. L. 330.⁽³⁾ (1849) 7 C. B. 561.⁽²⁾ (1874) 1 I. A. 364.⁽⁴⁾ (1863) 15 C. B. (N. S.) 376.⁽⁵⁾ (1868) L. R. 3 H. L. 330 at p. 341.

1901.

MOHOLAL
T.
BAT
JIVKORE.

It is clear from these judgments in *Rylands v. Fletcher* ⁽¹⁾ that before a person can be held liable in damages for injury caused to his neighbour's land by water either flowing from the former's land to the latter's or percolating from the one into the other, it must be shown that the water was brought or collected on his land by him voluntarily for his own purposes in a non-natural user of it. Otherwise, he is not liable. This is illustrated by the case of *Wilson v. Waddell* ⁽²⁾ cited for the appellant and also by *Snow v. Whitehead*. ⁽³⁾ In the former case, the plaintiff brought his action to prevent the flow of surface water from the defendant's upper coal field coming on to the plaintiff's lower coal field and doing serious damage in respect of which the plaintiff claimed reparation. The defence was that the defendant had conducted his operations in the ordinary mode with due and reasonable care and that the influx of water complained of was by natural gravitation. The House of Lords held, following *Rylands v. Fletcher*, ⁽⁴⁾ that the defendant when working the upper part of the mine was not under any obligation to the plaintiff, as owner of the mine on the dip, to preserve or to restore the impervious roof which, whilst it existed, prevented a great part of the rainfall from descending. One contention for the plaintiff in that case was that the water which had percolated into his mine from the defendant's mine was "foreign water, introduced into his," (defendant's), "mine from the surface," through the defendants's operations, carried on in an unusual, unreasonable and improper manner. But that contention was overruled by the Lords on the ground that, according to the evidence in the case, the defendant could not have worked his coal in the usual and proper course without breaking the surface. Similarly in the present case, though it may be said that the rain water accumulated on defendant's land as the result of his act, because it was due to the digging of the trenches by him, yet the digging was done and the surface of his land broken by him in the usual and proper course of the enjoyment of his land by the defendant. He had a right to

(1) (1868) L. R. 3 H. L. 330.

(2) (1876) 2 App. Cas. 35.

(3) (1884) 27 Ch. D. 588.

(4) (1868) L. R. 3 H. L. 330.

1901.

MOHOLAL

v.

BAT

JYKORE.

build and for that purpose to dig the foundations. There was no obligation cast upon him of taking steps to prevent rain water falling either on the surface or in the trenches dug for the purposes of building—nor was he bound to prevent that water percolating into defendant's property by the operation of the laws of nature, if the trenches were dug by him, not for the purpose of introducing water into them, but for the purpose of building and the natural user of his land.

In *Snow v. Whitehead* ⁽¹⁾ “in erecting a house upon their land, the defendants excavated the ground to form a cellar, and they built the house and put pipes down to convey the water from the roof, but they were not connected with any drain. The rain water came through the pipes into the cellar and collected there in a pool, evidently a considerable one, *because the water was used for the purpose of making mortar during the erection of the buildings.*” The water found its way by percolation through the land into the plaintiff's adjoining house and caused damage. Kay, J., held, following *Rylands v. Fletcher* ⁽²⁾, that the defendant was liable because the defendant had brought the water from his roof to his cellar and collected it there for purposes beneficial to himself. Now in the case before us, there is nothing of the kind. It cannot be said that the rain water which percolated into the plaintiff's land was introduced by the defendant into his trenches for purposes of his own. Rain would have fallen all the same on the surface of the land if the trenches had not been made and as the defendant had the right to make them in the natural and usual course of enjoyment of his property, the fact that when the surface was broken, the rain which would otherwise have fallen on the surface fell into the trenches, can make no difference.

Under these circumstances the question of the defendant's negligence does not arise and the decree of the Court below must be reversed and the plaintiff's claim dismissed with costs throughout on the respondent.

Appeal allowed.

⁽¹⁾ (1884) 27 Ch. D. 588.

⁽²⁾ (1868) L. R. 3, H. L. 330.

CRIMINAL REVISION.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

EMPEROR v. BAL GANGADHAR TILAK.*

1904,
March 3.

Indian Penal Code (Act XLV of 1860), section 193—Criminal Procedure Code (Act V of 1898), sections 435, 439—Indian Evidence Act (I of 1872)—Intentionally giving false evidence in a judicial proceeding—Absence of discussion of evidence for the defence—Explaining away the statement of the accused to his prejudice—Assignment of perjury—Proof—Misreading of documentary evidence—Fundamental errors in principle—Revisional jurisdiction.

According to the Criminal Law in England from which the Indian system is largely drawn, the assignment of perjury must be proved by two witnesses, or by one witness and the proof of other material and relevant facts confirming his testimony. This "is not a mere technical rule but a rule founded on substantial justice." The Indian Evidence Act (I of 1872) does not provide that there must be corroboration to support a conviction, but in ordinary cases and where the provisions peculiar to Indian Law do not apply, a rule which is founded on substantial justice may well serve as a safe guide to those who have to administer the criminal law in India.

Where with reference to an adoption the accused made a statement and where no other expression would with equal propriety have been used to express the corporeal act (of giving and taking in adoption), it is antagonistic to the first principles of criminal jurisdiction to explain away to the prejudice of the accused that statement which in its legitimate sense indicated a corporeal giving and taking.

Per Jenkins, C. J.—A conviction for perjury cannot stand where the *onus* has been wrongly placed; explanations have been demanded from the accused when no occasion for them existed; and the rule that there must be something in the case to make the oath of the prosecution witness preferable to the oath of the accused has not been satisfied.

For silence to carry incriminating force in a case like the present there must have been circumstances which not only afforded the accused an opportunity to speak, but naturally and properly called for the declaration which is said to be absent.

APPLICATION for criminal revision against the order of A. Lucas, Sessions Judge of Poona, confirming the conviction of the accused on one of two counts under which he was convicted and sentenced by E. Clements, First Class Magistrate of Poona.

* Criminal application for revision No. 1 of 1904.

1904.

EMPEROR
v.
BAL
GANGADHAR
TILAK.

The facts were as under;—

Shri Vasudeo Harihar Pandit *alias* Shri Baba Maharaj, a First Class Sardar of the Dekkhan, residing at Poona, died leaving a will dated the 7th August, 1897. Under the will the testator appointed five trustees or *panchas*, namely (1) Bal Gangadhar Tilak (accused), (2) Rao Saheb Kirtikar. Hazur Chitins, *nisbat* Karvir (Kolhapur) Sarkar, (3) Ganesh Shrikrishna Khaparde, Vakil, Amraoti, (4) Shripad Sakharam Kumbhojkar and (5) Balvant Martand Nagpurkar. The will provided as follows :—

My wife Shri Sakvar (Shri Tai Maharaj) is at present pregnant. If no son is born to her, or if one is born and dies prematurely, a son should be given in adoption with the advice of the above-named gentlemen, in the lap of my wife in accordance with the *shastras*, as many times as it may be found necessary, in order to continue the name of my family; and the above-named *panchas* should manage the moveable and immoveable estate on behalf of that son until he attains majority.

Out of the above-named five persons Rao Saheb Kirtikar declined to act as trustee and probate of the will was granted to the remaining four persons by the District Court at Poona on the 16th February, 1898.

Shri Sakvarbai *alias* Shri Tai Maharaj gave birth to a posthumous son who died an infant aged about four months. Owing to the death of the posthumous son there arose the necessity of selecting a boy for adoption as provided for in the will of Shri Baba Maharaj. Sometime passed in finding out a suitable boy for adoption and on the 18th June, 1901, a meeting of the four trustees was held in Shri Baba Maharaj's wada at Poona and it was then resolved that the several boys of Shri Maharaj family at Kolhapur were not fit for adoption and that a boy out of the descendants of the brother of Sidheswar Maharaj at Babre near Aurangabad should be selected for adoption and that no other boy from other families should be adopted. Accordingly Shri Tai Maharaj, Tilak and Khaparde went to Aurangabad on the 20th June, 1901, and on the next day, Tilak and Khaparde accompanied by some other men went to a place called Nidhone near Babre where the descendants of the brother of Sidheswar Maharaj lived. From Nidhone they took some boys

1904.

EMPEROR
OF
BAL
GANGADHAR
TILAK.

to Aurangabad for the selection of Shri Tai Maharaj. Out of the said boys, a boy named Jagannath, a son of Malhar Manohar Dev, was approved by Shri Tai Maharaj, Tilak, Khaparde and other persons. On the 27th June, 1901, a meeting of respectable and learned persons was called at Aurangabad and in their presence a verbal gift and acceptance of the boy to be adopted was made and on the same day a *dattakpatra* (deed of adoption) was also written bearing the signatures of Malhar Manohar Dev and Tai Maharaj, and attestations of witnesses. After these and other minor proceedings were finished, Shri Tai Maharaj, Tilak and other persons returned to Poona on the 28th June, 1901, Khaparde in the meanwhile having gone to Amraoti. After her return to Poona, Shri Tai Maharaj changed her mind and began to show clear indications that she wanted to adopt Bala Maharaj of Kolhapur and that the adoption would come off on the 13th or 16th July next. This circumstance led to a disagreement between Tilak, Khaparde and Kumbhojkar on one hand and Shri Tai Maharaj on the other, Nagpurkar who was the *karbhari* (manager) of Shri Tai Maharaj siding with her. There were various proceedings between the parties and among them there was an application, No. 112, dated the 29th July, 1901, made by Shri Tai Maharaj to the District Judge of Poona (Mr. Aston) who was also the Agent of Sardars in the Dekkhan, against the trustees for the revocation of the probate of Shri Baba Maharaj's will, on the ground that the will was invalid and that she succeeded to the estate as the heir of her deceased posthumous son. In the said application Shri Tai Maharaj alleged that :—

Opponents 1 and 2 (Tilak and Khaparde) taking advantage of petitioner's weakness as a woman, induced her to go to Aurangabad and forced her to sign some documents relating to adoption. After her return to Poona she took legal advice and was about to take steps to protect her rights when the accused (opponents ?) by unlawful acts prevented her and ultimately by keeping her in confinement for six days attempted to coerce her into consenting to certain matters. Fortunately an event occurred which put an end to her confinement.

During the progress of the inquiry under the said application, Tilak was examined as a witness for the applicant Shri Tai Maharaj and his examination lasted from the 16th November, 1902, to the 3rd April, 1903, sometimes from day to day. After

1904.
 EMPEROR
 v.
 BAL
 GANGADHAR
 TILAK.

the examination was closed, the District Judge gave sanction for the prosecution of Tilak, *inter alia*, under section 193 of the Indian Penal Code for giving false evidence in a judicial proceeding, as follows:—

In that he made the following statements under examination as a witness during the hearing of the Miscellaneous Application, No. 112 of 1901, in the District Court at Poona,

(1) The boy was formally placed by his father on the lap of Tai Maharaj and Tai Maharaj gave him sweetmeats and then the father said to Tai Maharaj, "Now you should protect the boy—the boy has now become your son : whether fool or wise, he is yours."

(2) We never kept her (Tai Maharaj) under restraint nor intended to do so.

The case was tried by E. Clements, First Class Magistrate of Poona, who after rejecting certain applications of the accused for the examination of witnesses whose evidence was considered to be material by the defence, found the accused guilty on both the counts of the charge and sentenced him to rigorous imprisonment for eighteen months and a fine of one thousand rupees ; in default, further rigorous imprisonment for two months.

On appeal by the accused the Sessions Judge acquitted him on the second count of the charge, but confirmed the conviction on the first count and reduced the sentence to six months rigorous imprisonment and a fine of rupees one thousand or in default further rigorous imprisonment for two months.

The accused having preferred an application for revision,

Branson (with *D. A. Khare*) appeared for the accused :—

Our first grievance is that the Magistrate should have examined certain witnesses whose evidence even the Sessions Judge considered was essential. We applied for a commission to examine them, but the Magistrate without giving any reasons cancelled the commission he had already granted. Most of the witnesses were so intimately connected with the facts of the case that our case has been prejudiced by their evidence not being on the record.

Secondly, we submit that the Judge should not have brushed aside the whole of the Aurangabad evidence. That evidence was also intimately connected with the principal allegations as to what took place at Aurangabad.

Thirdly, the Judge bases the conviction of the accused not on any positive evidence but rather upon what he considered to be the omission in certain of the letters addressed by the accused of the full description of what took place at Aurangabad. We contend that there is in fact no omission as in the earliest of such letters the fact of the adoption is mentioned. It is not at all necessary to give a complete description of all the ceremonies that take place at an adoption. The word adoption would connote that all the necessary ceremonies have been performed. There was no occasion to give a detailed description as the fact of the physical giving and taking of the boy was not challenged by anybody. (At this stage several Exhibits were gone through and consistency therein was pointed out).

1904.
EMPEROR
v.
BAL
GANGADHAR
TILAK.

Scott (Advocate General) with *Rao Bahadur V. J. Kirtikar*, Government Pleader, appeared for the Crown :—We submit that the High Court has no power to consider evidence in matters coming before it in revision.

As to the omission to call certain witnesses, the Magistrate has given reasons why he did not call them. The matter being within the discretion of the Magistrate, this Court has only to see whether he has exercised that discretion improperly and whether he had any data before him in the light of which he could exercise it. The Magistrate has referred to such data and has given his reasons. The Aurangabad evidence has been disbelieved by the Magistrate and the Judge also has disbelieved it by implication. The Magistrate and the Judge have very carefully sifted the several statements made by the accused in writing and we submit that the conclusion to which they have arrived with respect to the guilt of the accused is inevitable. In the letters the accused described the other ceremonies and expressly omitted to state anything about the physical giving and taking of the boy. The subsequent conduct of the accused is a piece of evidence which the Judge was competent to take into consideration. (Here several Exhibits were gone through to show that the physical giving and taking did not take place).

Branson (in reply) :—The High Court has power to interfere in revision. Section 435 of the Criminal Procedure Code

1904.

EMPEROR

v.
BAL
GANGADHAR
TILAK.

expressly authorizes the High Court to see whether the order of the Subordinate Court is proper.

JENKINS, C. J.:—The charge on which the accused has been tried is under section 193 of the Indian Penal Code with intentionally giving false evidence in a judicial proceeding in that he made the following statements while under examination as a witness during the hearing of Miscellaneous Application No. 112 of 1901 in the District Court of Poona:—

“(1) The boy was formally placed by his father on the lap of Tai Maharaj and Tai Maharaj gave him sweetmeats and then the father said to Tai Maharaj, ‘now you should protect the boy, the boy has now become your son: whether fool or wise he is yours’

“(2) We never kept her under restraint nor intended to do so.”

Mr. Clements, the Magistrate appointed to hear the case, found the accused guilty in respect of both statements, and, convicting him of the offence, passed on him a sentence of eighteen months rigorous imprisonment, and a fine of Rs. 1,000, with two months further rigorous imprisonment in default.

On appeal, Mr. Lucas, the Sessions Judge of Poona, has found the accused guilty in respect of the first statement alone, and reduced the sentence of eighteen months to six months rigorous imprisonment.

The accused has now applied to us in revision, basing his application principally on the grounds, first that the Magistrate and the Sessions Judge have failed to call evidence necessary for the proper determination of the case, and secondly, that the reasons of the Sessions Judge are insufficient to support the conviction. To understand the case a brief outline of the admitted facts is desirable.

On the 7th August, 1897, Shrimant Shri Vasudev Harihar Pandit *alias* Baba Maharaj, a Sirdar of considerable position in the Deccan, died leaving a will, whereby he appointed as his representatives, the accused, Rao Saheb Kirtikar of Kolhapur, Mr. Khaparde, Mr. Kumbhojkar and Mr. Nagpurkar, and to them he committed wide powers of management over his property. Rao Saheb Kirtikar declined to act, and probate was

granted to the rest. The testator was survived by his widow Tai Maharaj, who was pregnant at the time, and by his will he directed in the events there indicated that she should adopt a son with the advice of the trustees.

A posthumous son was born, but he died, and then the necessity arose of making an adoption. After some discussion in which the trustees and Tai Maharaj took part, it was determined that a visit should be paid to Aurangabad in connection with the adoption of a son, and accordingly on the 19th of June, 1901, Tai Maharaj and Messrs. Tilak and Khaparde with a number of attendants left Poona for Aurangabad. Several boys were seen, and ultimately the choice fell on Jagannath, the son of Bhausahab Dev, as the most suitable of those who had been inspected. Documents were executed in relation to the adoption, and on the 28th of June the party started for Poona.

The first of the two statements charged as false evidence in this case relates to what is alleged to have occurred at Aurangabad on the morning of the 28th. Soon after the return of the party to Poona, Tai Maharaj expressed her intention to adopt a young man from Kolhapur named Bala Maharaj, and ultimately purported to carry her intention into effect.

This brings us to the judicial proceeding in which the false evidence is stated to have been given. It commenced with a petition by Tai Maharaj to which the executors were parties as opponents, asking that the probate granted to them might be cancelled.

Such an application could only be made under section 50 of the Probate and Administration Act of 1881, and the only grounds stated in that section as a just cause of the cancellation which could have had any application were the 4th and 5th, with neither of which had the alleged adoption at Aurangabad anything whatever to do. Yet the accused, though cited by the petitioner as her witness, was kept in the witness-box, we are told, for no less than 17 days, during the greater part of which he was subjected to a most rigorous cross-examination by the person by whom he was called on matters wholly irrelevant to the subject then under investigation.

1904.

EMPEROR

OF

BAL

GANGADHAR

TILAK.

1904.

EMPEROR
v.
BAL
GANGADHAR
TILAK.

It was in the course of this examination that the accused made the statements on which the present charge is based.

The law of England requires that a false statement in order to support a charge should be material to the question in dispute, but the Penal Code does not impose that qualification, so that we need not consider the question how far the statement became material through the ruling of the Judge, who permitted it to be put.

We have nothing to do with the second of the two statements, for Mr. Lucas has held the charge in respect of it not proved we are only concerned with the first. The prosecution in respect of these statements originated with a document described as an order, sent by the Court before whom the application for cancellation of probate was made to the City Magistrate of Poona.

The offences ascribed by that document to the accused are many, and include forgery, and the using as genuine a forged document; yet, though the accused demanded that those charges should be proceeded with, this was not done, and the Advocate General has stated in this Court that all charges except that in question now before us have been abandoned.

First we will deal briefly with the objection that the Magistrate and Sessions Judge failed to call evidence necessary for the proper determination of the case.

The accused desired that Kumbhojkar should be examined on commission; he lived outside British territory, so his attendance before the Magistrate could not be secured, while it is clear his evidence might have been of considerable value to the accused.

On the 10th of February, 1903, at the accused's instance the Magistrate decided to ask for a commission under section 506 of the Criminal Procedure Code in the case of Kumbhojkar.

On the 26th of February Mr. Strangman, counsel for the prosecution, stated that he had good reasons for believing that Kumbhojkar would appear on the 16th of March if summoned. A summons was therefore issued and further proceedings in the matter of the Kolhapur Commission were stayed.

On the 13th April (to which date proceedings were adjourned on the 16th March) "Mr. Strangman produces the evidence of two witnesses—1 Nagpurkar, 2 Vishnu Narayan—regarding

Kumbhojkar's movements. Yeshwant Ganesh is also examined by the Court.....Mr. Karandikar is informed by the Court that the Court does not now consider that there are any grounds to issue a Commission for Kumbhojkar's evidence."

Now what was the evidence on which this conclusion is founded? Nagpurkar and Vishnu say in effect they were told by Yeshwant that Kumbhojkar was in Poona, so that their evidence was merely hearsay: but that is not all, for Yeshwant when called gave a direct denial to this.

How this evidence was made a ground for the decision we cannot conceive. The Sessions Judge thought "it would have been wiser if Mr. Clements had issued a Commission for the examination of Kumbhojkar at Kolhapur": it certainly would.

But this does not exhaust the accused's complaints, for he desired that Shankar Hari Gurav, Laxman Shivram Mhasvade and Anant Narayan Bele should be called by the Court.

The last of these three was an important witness, for not only did he accompany Tai Maharaj to Aurangabad, but also according to Parvati, one of the witnesses for the prosecution (Exhibit 52), "on *Dwadashi* Antoba Behale distributed sweetmeats as Jagannath had become Tai Maharaj's Yajman, *i.e.*, master." Antoba Behale is Anant Bele, we are told, and *dwadashi* is the 28th of June. Anant Bele is also said to have written an Exhibit, which was treated as of considerable importance by the Magistrate, Exhibit 14.

The Sessions Judge has commented on this and expressed the opinion that the prosecution erred in not calling these witnesses. With this we agree.

In explanation of his determination the Magistrate says "there are facts in this case which strongly support the prosecution in saying that these witnesses would not speak the truth."

On this Mr. Branson has commented that nowhere on the record does it appear that counsel for the prosecution made any such case, and this comment has not been displaced by the prosecution.

The considerations which weighed with the Magistrate were:—(a) "the extraordinary popularity and influence of

1904.

EMPEROR
v.
BAL
GANGADHAR
TILAK.

1904.

EMPEROR
v.
BAL
GANGADHAR
TILAK.

the accused;" (b) that there was evidence which suggested the inference that the accused took steps to undermine whatever authority Nagpurkar had over the establishment at the *wada*; (c) that there were facts which showed interference on the part of the accused with witnesses and persons, who might have given evidence for the prosecution; (d) that there was a very instructive example of the accused's methods in the case of Paryati; and (e) that it was in evidence that Shankar left his place in the *wada* while the case was going on and that Anant Bele had deserted Tai Maharaj.

It will be seen that only the fifth of these considerations had any direct application to the particular witnesses; the other four can only be noticed to be condemned, and we pass them by without more.

The evidence as to Bele's untruthfulness is Nagpurkar's and as to Shanker's is Tai Maharaj's, and we are of opinion that the Magistrate was wrong in concluding on their testimony they would not have spoken the truth.

The Sessions Judge has pertinently remarked that all the Magistrate could assume was that perhaps they would not speak in favour of the prosecution. No reason personal to Laxman was adduced.

We think the objection urged by Mr. Branson to the course adopted by the Magistrate, and not corrected though disapproved by the Sessions Judge, well founded.

This brings us to the gravest aspect of the case, we mean the objection urged and supported most ably by Mr. Branson, that the reasons of the Sessions Judge are insufficient to support the conviction.

Now what is the evidence as to the truth or falsehood of the first statement?

The direct oral evidence consists of the sworn testimony on the one side of Tai Maharaj to its falsehood, and on the other of the several witnesses called for the defence, who deposed to its truth.

The defence witnesses include (1) Krishna Shastri bin Nathu Shastri Durge, Exhibit D 67, whose occupation is described as the "observance of the daily routine of ceremonial worship"

and who was the astrologer consulted in connection with the Aurangabad adoption; (2) Mahadeo Ganesh Bele, Exhibit D 72, a pleader of Aurangabad; (3) Krishnaji Govind, Exhibit D 73, an acting teacher in a school on a salary of Rs. 75 per month; (4) Laxman Trimbak Parnaik, Exhibit D 74, a pleader in His Highness the Nizam's Courts; (5) Vinayak Balkrishna Dongade, Exhibit D 77, a schoolmaster on Rs. 12 a month; (6) Raghunath Divakar, Exhibit D 78, an Educational Inspector's karkun on Rs. 15 per month; (7) Keshav Vithal Bhide, Exhibit D 80, Head clerk, Educational Inspector's Office, on a pay of Rs. 45 per month and with a private income as an Inamdar of about Rs. 500 per annum; (8) Shankar Balvant Poohe, Exhibit D 81, Assistant Master of the High School, Aurangabad, on a pay of Rs. 20 per month and (9) Malhar Bhausaheb Dev, Exhibit D 82, Jagannath's father.

Here then we have in opposition to Tai Maharaj's interested statement, the testimony of several witnesses of apparent respectability, and yet the whole of their evidence is put on one side without a word of comment, beyond a profitless generalization as to the unreliability of native testimony. These witnesses were not examined before the Sessions Judge, or for the matter of that before the Magistrate, so that this wholesale disregard of their testimony cannot even be defended on an appeal to the opportunities of just appreciation commonly ascribed to the officer before whom witnesses are examined.

"We must be careful," it was said in *Mudhoo Soodun Sundial v. Suroop Chunder Sirkar Chowdry*, ⁽¹⁾ "not to carry this caution to an extreme length, nor utterly to discard oral evidence, merely because it is oral, and unless the impeaching and discrediting circumstances are clearly found to exist. It would be very dangerous to exercise the judicial function, as if no credit could necessarily be given to witnesses, deposing *vivâ voce*, how necessary however it may be always to sift such evidence with great minuteness and care." What is here said applies with even greater force where the witnesses thus dealt with are called on behalf of the accused, and where in the result action is taken against him. We can find in the judgment of the Sessions Judge

1904.
EMPEROR
v.
BAL
GANGADHAR
TILAK.

(1) (1849) 4 Moo. I. A. 431 at p. 441.

1904.

EMPEROR
v.
BAL
GANGADHAR
TILAK.

no attempt at sifting this large body of Aurangabad evidence, and had it been necessary, we should have been prepared to hold that the absence of any discussion of this evidence called for the defence constituted such a grave omission, that on that ground alone we would be bound to interfere. But we proceed in preference to discuss the case on the further lines on which it has been argued before us.

At the outset it is desirable to observe the foundation on which the Sessions Judge has built up his conclusions. He says "After a very careful consideration of all the evidence I have reluctantly come to the conclusion that it is quite unsafe to believe any of the oral evidence in the case except in the following cases:—(1) when it is borne out by documentary evidence, (2) when the statements and admissions are against the interest of the side on which the witness is examined, (3) when witnesses on either side agree as to any fact." We have already pointed out that the only oral evidence directed against the accused is that of Tai Maharaj, and, as to her and Nagpurkar, the Sessions Judge himself has said not merely that he was not prepared to act on their evidence, but that he was convinced both of them had given false evidence against the accused before Mr. Clements.

Now it is necessary to see what Tai Maharaj's evidence on the point is: it is quoted in some detail in the Sessions Judge's judgment and we need not now repeat it here: suffice it to say that it agrees in no respect with the version given by the accused and his witnesses; she even describes such scene as she admits, as having occurred in her bed-room. It remains then to be seen how her version is borne out by the documentary evidence. This part of the case is rested on the documents to which we will now refer.

They group themselves under two main heads, those prior to the visit to Aurangabad, and those that came into existence during or after that visit; of the first it is said that they do not point to a fixed plan to adopt a boy at Aurangabad, that on the contrary they show Tai Maharaj had by no means abandoned the idea of adopting Bala Maharaj of Kolhapur: of the second group it is said that there is a significant absence from them of reference to a corporeal giving and taking, and that they negative it at any rate by inference.

Now the first group is obviously the less important, and it is doing it no injustice to say that for the purpose in hand it would, standing alone, be of no value: at most it could only give colour of probability.

We therefore pass it by for the present and proceed to a consideration of the second group which falls into two divisions; those documents that came into existence during the visit to Aurangabad and those subsequent to it.

Now the documents in the first of these divisions call for the comment that in the circumstances they could not be, or contain, a narrative of the occurrence to which the accused deposes: they were prior to it, so that all that can be said of them is that they lend a probability to the one version or the other as representing what immediately before the event it was expected would happen. Thus these documents too, it is obvious, are open to the same remark as the first group on which we have already commented.

This brings us to the second division of the second group. As the argument derived from the silence ascribed to the accused has occupied so large a place in the discussion before us, it will be convenient to consider here its value as an incriminating circumstance. It is usual to refer this class of proof to the maxim *qui tacet consentire videtur*, but like most maxims, this must be taken with considerable qualification even in a civil suit, much more when it is used to establish the guilt of an accused. For silence to carry incriminating force in a case like the present there must have been circumstances which not only afforded the accused an opportunity to speak, but naturally and properly called for the declaration which is said to be absent. The first documents that call for notice are Exhibits 68-A and 68-B, both purporting to be sent by Tai Maharaj to Mr. Aston, as Agent for the Sardars in the Dekkhan, the first being written in English by the accused himself, the second in Marathi at his dictation. It is true that in neither of these documents is the corporeal giving and taking mentioned; in Exhibit 68-A it is said that the party went to Aurangabad to see and select a boy eligible for adoption, that Tai Maharaj had selected Jagannath, that preliminary documents had been executed, and that the ceremony

1904.

EMPEROR
P.
BAL
GANGADHAR
TILAK.

1904.

EMPEROR
C.
BAL
GANGADHAR
TILAK.

of adoption would be shortly celebrated. Exhibit 68-B is substantially to the same effect, but special reliance has been placed on the statement that "The celebration of the adoption ceremonies will take place at Poona hereafter when your Honour will of course be invited to the Durbar according to custom."

First then what is the value of the fact that in these documents the corporeal giving and taking is not mentioned in the light of the principle to which we have referred? In our opinion it has no appreciable force as a piece of self-disserving evidence: the proceedings at Aurangabad were not questioned at that time, much less was there any denial of a corporeal giving and taking, so that there was no occasion for the statement as to a detail of whose absence so much is made.

And we may here appropriately allude to the accused's statement in the miscellaneous proceedings that he had never heard that Tai Maharaj disputed the fact of adoption, and in truth it would seem that until those proceedings the corporeal giving and taking had never been questioned or even mooted.

In Exhibit 68-A it is said "*the ceremony of adoption will shortly be celebrated in Poona when due intimation and invitation will be formally given to your Honour,*" and stress has been laid on this by the prosecution as implying that the giving and taking still remained to be performed. But it has not been suggested, that it would be either necessary or usual for the Agent for the Sardars to be invited to witness the giving and taking of a son in adoption. Next the expression *the ceremony of adoption will be celebrated* is at least ambiguous: it may as well connote commemoration as performance. And even if the phrase be construed in the sense of a performance with appropriate rites and ceremonies, still on the authorities that would not negative the idea of a prior secular giving and taking.

The accused was not even questioned as to the precise force of this English version.

The passage in Exhibit 68-B, which we have read, at first sight appears to tell against the accused, when regard is had to the Marathi words used. Those words are *Datta Vidhan Samarambh*, which have been rendered "the adoption ceremonies." The argument is that inasmuch as the words *Datta Vidhan* mean the "act

of giving" the expression must have meant that there was to be an actual ceremony of giving and taking. But the expression has been clearly explained by the accused in the course of his examination in the miscellaneous proceedings, though the opposing pleader by whom he was examined either could not, or would not, understand the explanation. That explanation is that the words refer to the social functions in connection with the adoption, and if that be so, it does away with the idea of an inconsistency with the statement on which the accused is charged. No evidence has been adduced to show that this explanation is incorrect, and in answer to a question put to him by the Court, the Advocate General on instructions has admitted that if the accused intended to refer to the social ceremonies he names, there was no other expression that he could so appropriately have used. We have parallel expressions in English, where we speak of a wedding breakfast or a christening party without in any way suggesting a performance at those social functions of any ceremonial rites.

The next document is Exhibit 19 in appeal, a letter dated the 30th of June, 1901, and written by Nagpurkar under Tai Maharaj's order to Kumbhojkar.

It is said that there is no reference here to giving and taking; but in the first place this letter was not written by the accused; and next it is to be noted that in describing the events at Aurangabad Tai Maharaj says, "Mr. Dadasaheb Khaparde told me to adopt any one of these, especially, if possible, *the very boy who has now been adopted.*" These words clearly indicated a complete adoption and all that is essential to it, including a taking in the lap, with which every Hindu must be familiar as a necessary act to a complete adoption. This is in accord with what is later said in the letter:—"In short there now remains no work connected with adoption. The ceremony which has to be performed will be performed soon after selection of an auspicious day."

Exhibit D-63 written on the same date in our opinion suggests no valuable inference either way.

The prosecution then refer to Exhibit 63, suggesting that the heading is not consistent with a corporeal giving and taking, and that the mention of gift and acceptance in the item opposite

1901.

EMPEROR
v.
BAL
GANGADHAR
TILAK.

1904.

EMPEROR
v.
BAL
GANGADHAR
TILAK.

the sum Rs. 15-13-6 was an interpolation by the accused. The second of these suggestions is absolutely unwarranted, and appears to have been first made on appeal, while the heading was not written by Tilak, and is not unequivocal.

Then on the the 5th of July we have a report, Exhibit D 14, by the accused to the trustees of the estate, in which it is distinctly stated that the party returned from Aurangabad "after giving a boy in adoption on the lap of Shri Tai Maharaj", and "after finally disposing of this matter as settled." From Exhibits 23 and 22 it appears that this report came to the knowledge of Nagpurkar and that he recorded his assent.

The importance of this is that Nagpurkar, who after the visit to Aurangabad was working throughout with Tai Maharaj and against the accused, never challenged this distinct statement of corporeal giving and taking until several months later. In the face of this statement we are unable to understand how the Sessions Judge can have thought that the corporeal giving and taking was never asserted by the accused, or how he could have been led to explain away that explicit statement as merely metaphorical. It was admitted before us that no other expression could with equal propriety have been used to express the corporeal act, and it appears to us antagonistic to the first principles of Criminal Jurisprudence thus to explain away to the prejudice of the accused a statement, which in its legitimate sense indicates a corporeal giving and taking. The prosecution have attempted before us to get rid of the effect of this document by impugning it as an antedated fabrication, but nothing has been shown to support this contention, which does not seem to have been made before the Magistrate, was not noticed by the Sessions Judge, and is negatived by Exhibit 23. Finally the all-important statement in Exhibit D 14 that the party returned after a boy had been taken on the lap by Shri Tai Maharaj in adoption and after finally disposing of the matter as settled derives complete confirmation from the passage in Nagpurkar's assent in Exhibit 22 wherein he says "I will not help Shri Pandit Maharaj and Shri Tai Maharaj for *setting aside* Aurangabad adoption." On the 6th of July Tai Maharaj went to the Agent of the Sirdars and in Exhibit D 22 we have a complete

statement of all she told him. That document was written by her in his presence and it starts with the assertion, "the son made by Tilak is not pleasing to me." This in our opinion is an admission that the adoption had taken place, but for some reason is passed over without comment by the Sessions Judge. The Advocate General seeks to minimize the force of this sentence by contending that it must be read with Exhibit 19 in appeal, and that its true meaning is that the accused acted for her in the transaction. But this does not take away from the finality of the adoption implied, confirmed as it is by the phrase "the very boy who has been adopted," in Exhibit 19 in appeal.

We now come to the telegrams and letter sent by the accused to Kolhapur on the 11th of July after Tai Maharaj had attempted to proceed with the adoption of Bala Maharaj.

The first is Exhibit 10, a telegram from the accused to the Diwan of Kolhapur, in which it is said "giving and acceptance of a son by Tai Maharaj has been completed by registered deed at Aurangabad with trustees' consent." The prosecution lays stress on the reference to the giving and taking by registered deed, ignoring the effect of the word *completed*, which is certainly susceptible of the meaning that the registered deed was by way of complement to the act of giving and taking, of which it supplies tangible evidence of a character likely to influence the person addressed.

In Exhibit D 41, a telegram from the accused to the Diwan, it is said, "Trustees cannot sanction Bala Maharaj's adoption. Another boy has been already given and taken. Any other adoption would not be *valid* in law." Here the giving and taking is distinctly asserted as a bar to future adoption.

In Exhibit D 42, the accused telegraphs to the Diwan, "Any adoption by Tai Maharaj without trustees' consent is void and illegal according to Baba Maharaj's will and even if sanctioned by the Durbar will be contested." Exhibits D 43 and D 44 to the Sir Nyayadhi and the Gaitnis were in the same terms. In these telegrams an additional ground of objection is advanced, but in no way traversing or antagonistic to the others.

Exhibit D 45 is a letter written by the accused to the Diwan, in which he states the objections to Tai Maharaj's proposed adoption of Bala Maharaj.

1904.
EMPEROR
v.
BAL
GANGADHAR
TILAK.

1904.

EMPEROR
v.
BAL
GANGADHAR
TILAK.

Relying on the decision of the Privy Council, the accused maintains that Tai Maharaj cannot appoint any boy without the consent of the trustees, and he then proceeds to state the circumstances connected with the Aurangabad adoption asserting that Tai Maharaj selected and settled to take in adoption a boy named Jagannath, that a registered deed was passed by the father of the boy to Tai Maharaj giving his son in adoption and that Tai Maharaj accepted the gift by a *shera* on the document: the letter then proceeds "the adoption business is thus practically completed so far as the giving and receiving of a boy is concerned, and no other boy can now be adopted according to law. What remains is the ceremony which the trustees have resolved to celebrate soon after His Highness' permission to adopt is obtained in this case."

Later on it is said "when we returned from Aurangabad, it became known both here and at Kolhapur that the trustees were unwilling to adopt a boy above 12 and a boy from the Aurangabad family or branch *has been selected, given and taken for adoption.*"

In our opinion this letter, as will even more clearly appear from the summary of it in Exhibit D 46, a document of the next day's date, was intended to allege that as far as the giving and receiving were concerned, nothing remained to be done. We would here recall the fact that the corporeal giving and taking had been asserted six days before in the report, and it is inconceivable that the accused meant to retire from that position, which had not been challenged.

The next document on which the prosecution relies is the plaint in the Suit No. 237 of 1901 brought by the accused alone on the 12th of July against Tai Maharaj and others to restrain her from adopting without the consent of the trustees.

We are invited to draw an inference adverse to the accused from the fact that a corporeal giving and taking was not alleged and this omission is regarded as a "very significant fact" by the Sessions Judge.

We cannot understand how such an argument can have been seriously advanced, or for a moment entertained. The suit was brought by the accused alone for an injunction, so that the events at Aurangabad were irrelevant, for even a giving and taking

would not have created a right of suit in the plaint. His cause of action was the attempt to adopt without his consent. And yet an inference adverse to the accused has been drawn, because he has refrained from making an allegation that was not relevant.

We cannot for one moment adopt that view.

The Advocate General has suggested that Tilak ought to have joined Jagannath as a party, but the only answer the suggestion calls for is that in fact he did not, but rested his case, as he was entitled to do, on the cause of action appropriate to himself. As a matter of fact the pleader, who is responsible for the plaint, has given an explanation of how it came to be drawn as it was, and we know of no reason why that should not be accepted; but to regard the omission of a statement that there has been a giving and taking as significant is to misappreciate the legal position, and we hold that no inference adverse to the accused can be drawn from the plaint. Moreover Nagpurkar's recorded dissent may well have furnished a reason for avoiding any question as to the Privy Council ruling to which reference was made and on which Nagpurkar was known to rely (see Exhibit D 14).

On the 13th July the accused wrote Exhibit 74 to the Agent for Sirdars a letter in which he said, "as a matter of fact the giving and receiving in adoption of such a boy has been effected with the full consent of Tai Maharaj at Aurangabad.....the adoption now proposed is virtually a second adoption and therefore void in law." Much is made of the expression *virtually a second adoption* and evidently it was not without its influence on the Sessions Judge.

Seeing that the accused regarded the sanction of the Kolhapur Durbar as requisite to make the adoption fully operative on the Kolhapur property, it is not surprising that he should have used such phrases as *virtually* and *practically completed* and deference to the Kolhapur Durbar on this account may have influenced his choice of expression in Exhibits D 42, D 43 and D 44 to which we have already referred.

The next document is Exhibit 20 which throws no certain light on the case, and as far as we are aware no explanation of

1904.

EMPEROR
C.
BAL
GANGADHAR
TILAK.

1904.

EMPEROR
v.
BAL
GANGADHAR
TILAK.

this has been sought from the accused nor can any inference unfavourable to him be drawn from it.

The same remark applies to Exhibit D 49, while Exhibit 21 throws no light on this part of the case.

Then we come to Exhibit No. 44, the petition for cancellation of probate, and the only remark for which this document calls is that in it Tai Maharaj does not deny the *factum* of adoption but merely alleges coercion. We do not however attach importance to this omission.

Exhibit No. 11 is a document prepared by the accused and solemnly affirmed by him on the 15th of November, 1901.

The prosecution attach the greatest importance to it as purporting to give in detail all the proceedings connected with the adoption at Aurangabad, and yet as alleging only a gift oral and in writing without specifically alleging the taking in the lap.

But the fallacy lies in estimating what the document ought to have contained in the light of the subsequent dispute: at that date no dispute had been formulated as to corporeal giving and taking, and the point naturally emphasized was the permanent evidence in the documents executed, for it would not have occurred to any one that it was necessary in stating that a boy had been adopted to reiterate the observance of the details necessarily implied.

Having dealt with the evidence on which the prosecution relies it will be instructive now to observe the standard of caution in relation to charges of perjury observed by the highest authorities.

According to the Criminal Law of England, from which our system is so largely drawn, the assignment of perjury must be proved by two witnesses, or by one witness and the proof of other material and relevant facts confirming his testimony. And we have it on high authority that this "is not a mere technical rule but a rule founded on substantial justice." The Indian Evidence Act, it is true, does not provide that there must be corroboration to support a conviction, but in ordinary cases and where the provisions peculiar to Indian Law do not apply, a rule which is founded on substantial justice may well serve as a safe guide to those who have to administer the criminal law in India.

Judged by this standard the conviction clearly cannot stand, but even if it be discarded, it is in our opinion clear on the face of the Sessions Judge's judgment that there is not enough to support the conviction.

To summarize the position it comes to this : according to the Sessions Judge Tai Maharaj, the only witness for the prosecution on this point, has given false evidence against the accused in this case, and cannot be credited except where her testimony has been borne out in one or other of the three modes named by him : the Advocate General in reply to a question from the Court has been unable to suggest that any but the first of these three modes can apply here ; that is that Tai Maharaj's statement is borne out by the documentary evidence : in our opinion the documentary evidence when properly considered absolutely fails to bear out Tai Maharaj's negation.

A practical test of the value of these documents may be furnished by supposing that they constituted the sole evidence in the case, and that the accused was being tried on them before a Judge and a jury : in such circumstances we have not the smallest doubt that it would be an error of law for the Judge to allow the case to go to the jury. And yet we find the Magistrate says that "If it had been found impossible to procure Tai Maharaj's attendance in this Court, the case against the accused on the first and most important part of the charge, at any rate, would have lost none or practically none of its strength."

Our view of these documents is that even on the Sessions Judge's adverse reading of them they could not in reason do more than create suspicion and fall wholly short of legal proof, or even corroboration.

When the judgment is analysed it will be seen that it is really based on the inferences drawn from an assumed silence, but as we have already shown that silence could only be assumed by wresting words from their plain and natural meaning, and even were that not so, the circumstances at no time demanded the deduction on whose absence the conviction is based.

When the accused's statements are given their legitimate effect—we refer in particular to that contained in Exhibit D 14—it will be found that so far from there being a significant silence on his part, there was a distinct assertion by him which

1904.

EMPEROR
v.
BAL
GANGADHAR
TILAK.

1904.

EMPEROR
v.
BAL
GANGADHAR
TILAK.

was never traversed until the proceedings in which he is supposed to have given false evidence. The onus has been wrongly placed; explanations have been demanded from the accused when no occasion for them existed; and the rule that there must be something in the case to make the oath of the prosecution witness preferable to the oath of the accused has not been satisfied.

We have not discussed individually the introductory documents as it follows from our estimate of the direct evidence in the case that they can carry matters no further, for there is nothing established to which they can give support. This applies even to the minute dated the 18th June of the trustees' resolution, which has been much discussed on both sides and we therefore only propose briefly to notice those whose value, such as it is, is derived from their nearness in time to the occurrence. First there is the deed of adoption and as to this it is said that it contains no words indicating a corporeal gift, and that this becomes the more significant in view of the fact that words descriptive of that act were struck out of the draft. On this we would make the comment, that apart from the fact that the documents could not purport to be a narrative of events that had happened, they clearly contemplate that the only thing that would remain to be done would be the ceremonies of *datta homa*, &c., and that all that was essential to make Jagannath the son would be performed at Aurangabad while the ceremonies of *datta homa*, &c., might be performed at any place.

The shastri's certificate invites the same class of comment. Exhibit D 57 must be read as a whole so that though the words "I shall not adopt any boy other than this (your son)" may admit of the view that it was a necessary safeguard, it is impossible to overlook the far more distinct expression "he has the same position as my begotten son would have had, if I had one." In this connection we may refer to the difficulty experienced by the Judge by reason of the accused's assertion that the actual placing on the lap was on the 28th, but only in order to point out that the difficulty solely arises if Tilak's statement is assumed to be false and that is the whole question in dispute. The fallacy into which the learned Judge has fallen is patent.

As we are dealing with this case in revision we have accepted the Judge's appreciation of the oral evidence and refrained from discussing the probabilities, but we find it difficult to understand what improbability can attach to the alleged incident of the placing in the lap, if the influence of the accused was sufficient to secure the execution of the adoption deed, and that as Tai Maharaj alleges, against her will and in spite of her protests.

The Advocate General's opening argument before us was based on the fact that the case is before us in revision and not on appeal. But section 435 of the Criminal Procedure Code vests this Court with power to call for the records of inferior Courts for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the irregularity of the proceedings of an inferior Court while section 439 defines our powers of revision.

We have avoided reappreciating the oral evidence: we have accepted the Sessions Judge's estimate of it, though, as we have shown, the accused had reason to complain of the failure to discuss the testimony of the witnesses called by him.

Our ground of interference, it will be apparent, is the misreading of the documentary evidence and the fundamental errors in principle, which vitiate the conduct and disposal of the case.

Accordingly we set aside the conviction and sentence, and order the fine, if paid, to be refunded.

Conviction and sentence set aside

1904.

EMPEROR
v.
BAL
GANGADHAR
TILAK.

PRIVY COUNCIL,

P. C.*
1904.

May 12, 13.
June 3.

THE BOMBAY TRAMWAY COMPANY (PLAINTIFFS), v. THE MUNICIPAL CORPORATION OF THE CITY OF BOMBAY (DEFENDANTS).

[On appeal from the High Court of Judicature at Bombay.]

Bombay Tramways Act (Bombay Act I of 1874), section 30—Purchase by Municipal Corporation of Bombay of Tramway undertaking—Notice of intention to purchase—Arrangement by Corporation with third person—Date of purchase for purpose of ascertaining compensation—Liability of Tramway Company for track rent during period between notice and date of purchase.

By an agreement, dated 12th March, 1873, the Municipal Corporation of Bombay (the respondents) allowed certain persons, of whom the Bombay Tramway Company (the appellants) were the assignees, to construct and work tramways in the City of Bombay. Section 30 of the Bombay Tramways Act (Bombay Act I of 1874) gave the respondents the right to purchase the tramways from the appellants "with the plant, stores, rolling-stock and everything connected therewith after the expiration of 21 years from the 12th day of March, 1873, upon declaring their intention so to do within six months after the expiration of the said 21 years," and gave them "a renewed right of purchase at the end of every seven years after the expiration of the said 21 years upon similar notice being given." Notice of the intention to exercise such renewed right of purchase was duly given by the respondents on 14th March, 1901. In a suit by the appellants against the respondents to have their rights under the purchase declared,

Held, by the Judicial Committee (affirming the decision of the Courts below) that the notice was not invalid by reason of the respondents having made an arrangement with a third person who was to find the money for the purchase and work the tramways when acquired by the respondents, it appearing that the respondents were acting as principals in the matter, and not as agents of such third person, and that there was nothing in the Act to prohibit such a transaction or to show that when acquired the respondents were bound to keep the tramways in their own hands, and work them themselves.

By section 30 of the above Act it was further enacted that "the amount to be paid in the event of such purchase shall be the actual *bonâ fide* value (exclusive of any compensation for goodwill, premium, or compulsory sale or other consideration whatsoever) of the tramways and of the works and materials connected therewith and of the lands and buildings and all other the property of the grantees, such value in case the parties do not agree to be decided by arbitration as provided by the agreement of 12th March, 1873; and as compensation for the goodwill, premium, or compulsory sale and other considera-

* *Present*: LORD MACNAGHTEN, LORD LINDLEY and SIR ARTHUR WILSON.

tion the grantees shall be paid an amount equal to 21 years' purchase calculated on the average profits of the previous 3 years next preceding the purchase." The first Court decided that the date of the purchase for the purpose of ascertaining the compensation was the date of the notice, namely, the 14th March, 1901; but both parties appealed from that decision. The High Court on appeal held that the date of the purchase would be the date when the value was ascertained.

Held, by the Judicial Committee, that the proper date to be fixed would have been when the relation of vendor and purchaser was definitely created by the service of the notice of intention to purchase, that is, the 14th March, 1901; but that having regard to the course taken by the parties, neither party without the consent of the other could insist that that date ought to be adopted, and that under the circumstances there were no grounds for disturbing the date fixed by the High Court on appeal, namely, the date of the award fixing the value of the corporeal property of the appellants.

Pending the ascertainment and payment of the purchase-money the appellants agreed to continue to work the tramways on the understanding that they received "the income and profits of the tramway business during such period."

Held, by the Judicial Committee (affirming the decision of the High Court on appeal) that the appellants were liable for track rent during the period they so continued to work the tramways: so long as they took the profits they must pay the ordinary expenses of working them, and the track rent.

APPEAL from a decree (18th February, 1902), of the High Court at Bombay in its appellate jurisdiction affirming with certain variations a decree (26th September, 1901), of the same Court in its ordinary original jurisdiction.

The suit in which the above decrees were made was brought on 13th March, 1901, by the Bombay Tramway Company against the Municipal Corporation of the City of Bombay as first defendant, and against two other defendants who were trustees of a deed executed by the plaintiffs to secure payment of certain debentures. Against these two defendants no relief was sought and no question concerning them arose in this appeal. The suit sought relief and a declaration of the plaintiff Company's rights with reference to a purchase of their property and business which the Corporation of Bombay claimed to have made under the provisions of section 30 of the Bombay Tramways Act (Bombay Act I of 1874) which is set out in their Lordships' judgment.

The plaint stated that the Bombay Municipal Corporation by agreement, dated 12th March, 1873, granted to W. F. Stearns and G. A. Kittredge and their assigns the right to construct and

1904,

BOMBAY
TRAMWAY
COMPANYv.
THE MUNI-
CIPAL COR-
PORATION
OF BOMBAY.

1904.

BOMBAY
TRAMWAY
COMPANY
v.
THE MUNI-
CIPAL COR-
PORATION
OF BOMBAY.

maintain and to use tramways in Bombay upon certain terms contained in the agreement which was afterwards set out in a schedule to Bombay Act I of 1874, an Act passed to enable the grantees and their assigns to lay down and maintain the Tramways contemplated by the agreement and for other purposes connected therewith; that the grantees assigned their rights to a registered Company called The Bombay Tramway Company, Limited, which constructed and used certain tramways, and in 1884 went into liquidation, and that a new Company—the present plaintiff Company—was formed which took over the property and business of the old Company including the tramways; that on 11th March, 1901, the plaintiff Company received from the Municipal Commissioner of Bombay the following notice:—

“That, in exercise of the powers conferred upon it by section 30 of Bombay Act I of 1874 and clause 15 of the Articles of Agreement of the 12th March, 1873, between the Justices of the Peace for the City of Bombay of the one part and William French Stearns and George Alvah Kittredge of the other part, the Municipal Corporation of the City of Bombay hereby declares its intention to purchase at the end of the now current period of seven years from the expiration of the period of twenty-one years mentioned in the said section and clause respectively (and which said period of seven years will expire on or about the 12th March, 1901), the tramways of the abovenamed Bombay Tramway Company, Limited, constructed under the said Act with the plant, stores, rolling-stock, and everything connected therewith.

Dated this 11th day of March 1901.”

Two other similar notices dated 12th and 13th of March, 1901, (the latter one being served on 14th March) were received by the plaintiff Company from the defendants.

The plaint further alleged that the defendant Corporation had on the 11th March, 1901, entered into an agreement with Mr. W. G. Bingham “by which the first defendant agreed to make the proposed purchase of the plaintiffs’ property and business on behalf of and for and on account of the said Mr. Bingham”; that the abovementioned notices had “all been sent to the plaintiffs by the first defendant by reason of the said agreement with Mr. Bingham and could not have been sent if the said agreement had not been entered into.” And the plaintiffs submitted that the Corporation had not “acquired any right to purchase the property and business” of the plaintiff and

1904.

BOMBAY
TRAMWAY
COMPANY
v.
THE MUNI-
CIPAL COR-
PORATION
OF BOMBAY.

that Bombay Act I. of 1874 and the agreement of 12th March, 1873, "only contemplated a *bond fide* purchase by the Municipal Corporation on its own account and do not authorize a purchase or intention to purchase as the agent of or on account of a third person"; and that under the Act and the agreement of 1873 the Corporation had no power to acquire the said property and business "save in the case of the first defendant's *bond fide* intending to acquire the said property and business for the Municipal Corporation of the City of Bombay with the *bond fide* intention of carrying on and working the said business themselves"; and the plaintiffs submitted that the Corporation "has no such *bond fide* intention."

As to the value of their property and business the plaintiffs claimed under two heads, first, the actual *bond fide* value (exclusive of compensation for goodwill, etc.) and secondly, compensation for goodwill, etc., and they desired to have the amount under the second head determined by the Court, but were willing that the amount payable under the first head should be decided by arbitration if the first defendants so desired.

The plaintiffs also alleged that important questions of law were likely to arise in ascertaining the average profits of their business, "as to when the three years next preceding the purchase begin and end, and what date is to be fixed as the date of the purchase by the first defendant; as to when the ownership of the plaintiffs' property passes to the first defendant; and as to whether or not the plaintiffs are not entitled to remain in possession of their property and to enjoy the rents and profits thereof until the day of payment by the first defendant of the purchase-money; and, if not, what interest is to be paid to the plaintiffs on the unpaid purchase-money." And the plaintiffs submitted that if it should be held that valid notice had been given by the Corporation, then from the date when such notice was given the agreement of 12th March, 1873, (save clause 15) ceased to be in force, and that in such a case they were not bound by the terms of the agreement. The plaintiffs prayed relief in accordance with their allegations. The written statement of the Corporation submitted that the suit was premature and that any questions arising should when they arose be

1904.

BOMBAY
TRAMWAY
COMPANY
v.
THE MUNI-
CIPAL COR-
PORATION
OF BOMBAY.

decided by arbitration under clause 23 of the agreement of 1873. This agreement they submitted was not inconsistent with the Act and was still, so far as applicable, binding on the parties. They maintained that the notices given were sufficient and they denied that their agreement with Mr. Bingham affected their rights as regarded the plaintiffs.

Issues were settled raising all the points in dispute. Issues 1 and 2 were as to the validity and effect of the notices: 3, 4, 6 and 7 as to the effect of the arrangement with Mr. Bingham and of the Corporation having no intention to work the tramway themselves: 5 whether the agreement of 1873 came to an end when a valid notice was given, or was still in force: 8 as to the date to be fixed as the date of purchase: 9 as to when the ownership passed: 10 as to when "the three years next preceding the purchase begin and end": 11 as to the proper method of ascertaining the average profits of the said three years under section 30 of the Act, and clause 15 of the agreement of 1873: 12 and 13 whether the plaintiffs were entitled to retain possession of the property and enjoy the profits until payment of the purchase-money, and if not to what interest on the purchase-money were they entitled: 14 as to the respective rights of the parties on the true construction of Bombay Act I of 1874 and the agreement of 1873.

As to the notices served by the Corporation on the plaintiff Company, both the lower Courts held that notice of intention to purchase was given in proper time.

The chief questions argued on this appeal were:—

1. Whether or not the notices were invalid on the ground that they were not given *bonâ fide* on behalf of the Corporation but were given on behalf of Mr. Bingham, or on the ground that the purchase was made with the view of Mr. Bingham taking over and working the tramways?

2. At what time must the Corporation be taken to have made the purchase for the purpose of estimating the compensation payable by the Corporation for the goodwill, premium, or compulsory sale and other consideration?

3. Whether the Corporation is entitled to track rent as long as the Tramway Company is in possession and receives the income and profits derived from working the tramway?

As to the last question (3) the Municipal Commissioner on behalf of the Corporation wrote to the plaintiff Company inquiring whether the "Company will be willing pending the ascertainment and payment of the amounts payable to them under section 30 of the Bombay Act I of 1874, and the handing over charge of the undertaking to continue the working of the tramways" and expressing the desire of the Corporation that no "interruption of the excellent public service" theretofore maintained might occur. In reply the Manager of the plaintiff Company on 12th March, 1901, wrote as follows :—"With regard to the question of the continuance of the working of the tramways my Company will continue to work the tramways pending the ascertainment and payment of the purchase-money on the understanding that they shall receive and enjoy the income and profits of the tramway business during such period. In fact I am advised that the Company is legally entitled to do so. Without prejudice to any of the Company's legal rights I am prepared to come to an agreement with you to the effect that my Company shall continue to work the tramways on the terms aforesaid pending the ascertainment and payment of the purchase-money." On 13th March, 1901, the Municipal Commissioner wrote agreeing to the terms mentioned in the letter of 12th March, 1901, and asking whether the Company would draw up an agreement or whether the Solicitors of the Corporation should do so. The plaintiff Company replied on the same day confirming the agreement and requesting the Municipal Commissioner to have it embodied in a document by the Solicitors to the Corporation. On 2nd May, 1901, a claim for track rent was made on the plaintiff Company by the Corporation, but the Company on 18th May refused to pay it, claiming that their liability ceased on the date of the notice of intention to purchase provided it was held valid.

One of the Judges sitting on the Original Side of the High Court (Fulton, J.) in his judgment in the suit held with reference to the arrangement of the Corporation with Mr. Bingham that it did not constitute the Corporation the Agents of Mr. Bingham in respect of the purchase of the tramways; that "in giving notice of purchase the Corporation are not acting for Mr.

1901.

BOMBAY
TRAMWAY
COMPANY
v.
THE MUNI-
CIPAL COR-
PORATION
OF BOMBAY.

1901.

BOMBAY
TRAMWAY
COMPANY
v.
THE MUNICIPAL CORPORATION
OF BOMBAY.

Bingham, for it is on the Corporation and not on Mr. Bingham that the Legislature has conferred the statutory power"; and that the Corporation in dealing with the Tramway Company were "exercising their own powers" and not powers derived from Mr. Bingham.

On the question as to the date of the purchase the learned Judge held that the 14th March, 1901, was the date of the purchase, the date on which the property passed to the Corporation, and the date on which ended the "three years next preceding the purchase."

As to the question of the liability of the plaintiff Company for track rent, he held that the agreement of 12th March, 1873, came to an end on 14th March, 1901, and that "the provisions of clause 18 which provides for the payment of track rent ceased to be operative," and that track rent therefore ceased on 14th March, 1901, to be payable.

Both parties appealed from that decision, the appeal of the Corporation being No. 1179 of 1901 and that of the Tramway Company being No. 1181 of 1901. The appeals were heard by an Appellate Bench of the High Court consisting of Jenkins, C. J., and Starling, J., who in separate judgments but substantially on the same grounds varied the decree of the original Court, as to the date of the purchase, and also as to the liability for track rent, but agreed with the decision of that Court that the notice given by the Corporation was not invalid by reason of their agreement with Mr. Bingham. The material portions of the judgments were as follows:—

JENKINS, C. J. (in Appeal No. 1181 of 1901):—I now come to the third and last objection urged against the validity of the notice: that it was on its merits not such a notice as the Act authorises. First it is said that the notice was not a declaration of the Corporation's intention to purchase but of Mr. Bingham's, and secondly if it was a declaration of the Corporation's intention, it was vitiated by the ulterior purposes in view, that the Corporation was exercising its powers for a collateral purpose outside the limits of its statutory authority and actually for an unlawful purpose. First, then whose was the intention to buy? This is a question of fact, and having regard to the record it has to be determined on documentary evidence alone.

Before Mr. Justice Fulton it would seem that the objection was based principally, if not wholly, on the theory of agency. Before us the suggestion of agency has fallen into the background to give place to the contention that the

purchase was "on account of Mr. Bingham." It is clear and indeed not disputed by the Corporation, that prior to the notice a transfer by the Corporation was intended and arranged, and that without such an arrangement no notice would have been given; but this, it is contended, was a prudent measure and certainly did not involve the consequences for which the Tramway Company contends.

After discussing the evidence relating to this objection, and the terms of the agreement between the Corporation and Mr. Bingham the judgment continued:—

I have now referred to the most material parts of the evidence that bear on the matter now in hand, and I come to the conclusion that it cannot be said that the Corporation was the agent of Mr. Bingham or that the notice was of his intention to purchase and not of the Corporation's. Further than that I hold, notwithstanding the expressions to be found in the documents, that it cannot be said that the purchase was "on his account" in the sense that it cannot be treated as a purchase by the Corporation within the meaning of section 30 of the Act. No doubt it is a part, and an essential part, of the Corporation's scheme to pass on the right of working the tramways to Mr. Bingham or his nominees, but I fail to see that this *per se* or under the facts disclosed in this case makes the purchase any the less the purchase of the Corporation. From the point of view with which we are now concerned, it is not so much that Mr. Bingham is making use of the Corporation, as that the Corporation is making use of Mr. Bingham for the purpose of attaining the end it has in view. It was not Mr. Bingham who inspired the notion of giving the requisite notice, nor was it on his initiative that the Corporation conceived the idea of proceeding under section 30 of the Act, though his co-operation may in the end have enabled the Corporation to bring matters to a practical issue. I however see nothing wrong in this, and, in my opinion, the objection fails.

This however does not exhaust the objection urged against the notice given, for it is contended that even if the purchase is by the Corporation, still it is bad, inasmuch as it is for a collateral purpose and with an illegal object.

After referring to the principle invoked as formulated by Lord Cranworth in *Stockton and Darlington Railway Company v. Brown*⁽¹⁾ and *Galloway v. Mayor and Commonalty of London*⁽²⁾ that when the Legislature gives powers to persons for a special object, they cannot be allowed to exercise the powers conferred on them for any collateral object as that would be putting into operation their statutory powers for a purpose for which it was not intended they should be exercised, the judgment proceeded:—

(1) (1860) 9 H. L. C. 246 (256).

(2) (1866) L. R. 1. H. L. 31 (43).

1904.

BOMBAY
TRAMWAY
COMPANY
v.
THE MUNICIPAL
CORPORATION
OF BOMBAY.

1904.

BOMBAY
TRAMWAY
COMPANYv.
THE MUNI-
CIPAL COR-
PORATION
OF BOMBAY.

Of the existence of the principle there is no doubt; the question is whether the facts of this case invite its application. To determine this it is necessary to see what is the precise position of the Corporation. Clearly it could purchase the undertaking; section 30 leaves no doubt on that head. But having purchased, what could it do with it? The suggestion of the plaintiff (24) and of the memorandum of appeal (5) is that the Corporation has no power to acquire the right to purchase, save in the case of the Corporation "*bona fide* intending to acquire the said property and business for itself with a *bona fide* intention of carrying on and working the said business itself." When it was put to Mr. Inverarity whether he adhered to that proposition in its integrity he hesitated to give an unqualified answer in the affirmative, though he was reluctant to abandon the concluding condition of the proposition. I can understand his somewhat negative attitude towards the proposition because it is admirably framed to test the question on which we are now engaged. In the first place then *rebus sic stantibus* can the Corporation carry on and work the tramways it is empowered to acquire? This involves an answer to two questions, first, on the completion of a purchase would the power pass to it, and secondly if it did, would the Corporation's constitution permit of its exercising that power?

It is clear on principle and authority that statutory powers such as are essential to the working of a tramway undertaking are not capable of assignment. In *Beman v. Rufford*,⁽¹⁾ it was said by Lord Cranworth "the Oxford, Worcester, and Wolverhampton Company are delegating the functions which the Legislature has given them to other parties, which they have no possible right to do." This principle has since been clearly established by later decisions. (*Great Northern Railway Company v. The Eastern Counties Railway Company* ⁽²⁾, *Winch v. Birkenhead Lancashire and Cheshire Junction Railway Company* ⁽³⁾, *Gardner v. London Chatham and Dover Railway Company* ⁽⁴⁾, and *Edinburgh Street Tramways Company v. Lord Provost, &c. of Edinburgh* ⁽⁵⁾.)

Their powers, however, can be exercised, not only by the original grantees, but also by every one within the particular designation contained in the Act. Thus in this case the powers of the Act are exercisable, not only by Stearns and Kittredge, but also by every one answering the designation of grantee, *i.e.*, their executors, administrators, and assigns. Then, again, by section 31 of the Act, it is provided that the grantees may sell their rights and powers to others.

For the Tramway Company it has been contended that the provisions of section 31 do not apply to a sale under section 30, and that the Corporation on a sale under section 30 cannot claim to be assigns and so grantees within the definition of the Act. If this argument be well founded, as to which it is unnecessary that I should at this stage express my opinion, then obviously the

⁽¹⁾ (1851) 1 Sim. N. S. 550 (569).⁽³⁾ (1852) 5 De. G. & Sm 562.⁽²⁾ (1851) 9 Hare 306.⁽⁴⁾ (1867) L. R. 2 Ch. 201.⁽⁵⁾ (1894) A. C. 456.

Corporation has no power to exercise the powers of "carrying on and working the business." Be this, however, as it may, there is another obstacle in the way of its working the tramways: such a power is outside the Corporation's constitution, and it does not appear to me that it was the intention of the Legislature by the Tramways Act of 1872 to enlarge its constitution in this direction. The purpose of the Act is to sanction the invasion of the rights of the public, and not to extend the Corporation's powers by authorising it to work the tramways.

But if the Corporation has no power to work the tramways, what is it to do when it has purchased the undertaking? It is important in this connection to bear in mind that it is not a body called into existence for the purpose of acquiring the tramways, and that it is not vested with the right to purchase for the purpose of private speculation and adventure, but to safeguard and advance the interests of the Bombay public. It cannot then have been intended that the Corporation was to expend the large sums payable under section 30 for no purpose, or that the whole tramway system of the city should on a purchase under that section come to an end; it must have been contemplated that the undertaking should be continued by those to whom it was transferred or passed on by the Corporation, in case it did not acquire the requisite power of working for itself. This, in my opinion, is the true view of the position, and it follows that the Corporation were within their rights when they made the arrangement they did with Mr. Bingham. They did that which was prudent and proper under the circumstances, and, in my opinion, the notice was not vitiated by the ulterior purpose in view. To me it seems that there is no force in the suggestion that the agreement between the Corporation and Mr. Bingham involves a breach of the provisions of the Penal Code, and so impairs the validity of the notice. Even assuming for the sake of argument that Mr. Bingham or his assigns will not be entitled to exercise the powers contained in the Act, or to work the tramways without further legislative authority, still this would not vitiate what the Corporation has done; that is a matter between the Corporation and Mr. Bingham, and may possibly release the parties to that contract from the liabilities they assumed; it would not make the notice bad as between the Corporation and the Tramway Company.

I have now dealt with and answered all the points alleged against the notice and I hold that the notice is good.

On the question as to the time at which the Corporation must be taken to have made the purchase for the purpose of estimating the compensation payable, by the Corporation, the learned Chief Justice said:—

The first question is what is the amount to be paid by the Corporation to the Tramway Company? This is the subject of section 30 of the Tramways Act, and clause 15 of the agreement.

1904.

BOMBAY
TRAMWAY
COMPANY
v.
THE MUNI-
CIPAL COR-
PORATION
OF BOMBAY.

1904.

BOMBAY
TRAMWAY
COMPANY

v.

THE MUNI-
CIPAL COR-
PORATION
OF BOMBAY.

Now, section 3 of the Act makes it clear that if there is any inconsistency between the agreement and the Act, the latter is to prevail. This would necessarily be so, but the importance is that the Act contemplates that there may be an inconsistency. It follows then that what we have to interpret is the 30th section of the Act.

Now, that section contemplates the payment of two distinct amounts. First there is the amount which is "the actual *bonâ fide* value of the tramways, and of the works and materials connected therewith and of the lands and buildings, and all other the property of the grantees"; and secondly, there is "the compensation for the goodwill, premium, or compulsory sale and other consideration," being "an amount equal to 21 years' purchase calculated on the average profits of the previous three years next preceding the purchase, 4 per cent. per annum on the *bonâ fide* value mentioned above being first deducted from such profits." The first of these amounts I will for brevity hereafter call "the value," and the second of them "the compensation." The section is clear as to the event in relation to which "the compensation" is to be determined; it is "the purchase" whatever that may be. The Corporation maintain that "the value" too should be determined in relation to the same date. The Tramway Company on the other hand insists that, though the compensation is to be determined in relation to the purchase, the value is to be fixed in reference to the notice to treat. Mr. Justice Fulton held that the property was purchased and actually passed on the notice, and in that view obviously no difficulty arises. Both sides however combine to attack this view. The argument that the notice is the appropriate date, is based on the line of cases dealing with notices to treat under the Lands Clauses Consolidation Act and cognate enactments. We have thus been referred to *Adams v. The London and Blackwall Railway Company* ⁽¹⁾, *Haynes v. Haynes* ⁽²⁾, *Metropolitan Railway Company v. Woodhouse* ⁽³⁾, *Penny v. Penny* ⁽⁴⁾, *Tyson v. Mayor of London* ⁽⁵⁾, *Ex parte Edwards* ⁽⁶⁾, and *Wilkins v. Mayor of Birmingham* ⁽⁷⁾; and no doubt it is there laid down that on a notice to treat the parties for certain purposes stand in relation to each other of vendor and purchaser. But the question still remains how far have those cases any bearing on the point now before us? Obviously they are not directly in point for they are based on an Act different in its scheme and in its terms from the Tramways Act. Again the analogy they may be said to furnish is by no means close, for though we have in the Tramways Act the expression "compulsory sale" it refers to a transaction essentially different from the compulsory sale of which the Lands Clauses Consolidation Act treats. The compulsory sale of the English Act is in derogation of rights to all interests and purposes absolute, while that which is the subject of the so-called compulsory sale under the Tramways Act from its very origin was subject to the limitation implied by the Corporation's right to purchase. It is true it is

(1) (1850) 2 Mac. & G. 118 (129).

(4) (1868) L. R. 5 Eq. 227.

(2) (1861) 1 Drew & Sm. 426.

(5) (1871) L. R. 7 C. P. 18.

(3) (1865) 34 L. J. Ch. 297.

(6) (1871) L. R. 12 Eq. 389.

(7) (1883) 25 Ch. D. 78.

1904.

BOMBAY
TRAMWAY
COMPANY
v.
THE MUNI-
CIPAL COR-
PORATION
OF BOMBAY.

called a compulsory sale, but the mere use of that term obviously would not of itself attach the consequences which follow on a sale under the Lands Clauses Act. When regard is had to the fact that the 30th section is substantially a reproduction of clause 15 of the agreement the analogy it suggested is that of a sale in performance of an ordinary conventional option. In the machinery also of the two Acts there is no correspondence; as for example the right to take possession under the circumstances indicated in the English Act, has no place in the Tramways Act. It seems to me then that we must construe this Act on its own words, and that the cases to which I have alluded serve to throw little or no light on its true interpretation.

In the absence of any contrary indication in the section it would not be unreasonable to hold that the valuation ought to be made in relation to the date of the notice; nor do I think it would be any answer to this, as the Corporation urges that it would be difficult now to ascertain the value on that basis. If any such difficulty exists it is of the Corporation's own making, for there was nothing to prevent it at once proceeding to have a valuation made.

I think, however, we have in the Act a clue to the date to which the ascertainment of the value must be referred. In my opinion it is the reasonable view to refer the fixing of the value and the compensation to the same date. Each amount is equally a payment to the Tramway Company in respect of that which it loses as a result of the notice, and I can see no reason why the several amounts should be fixed in reference to different dates. The conclusion then to which I come is that the value and the compensation are to be fixed in reference to the same date. What then is that date? The section provides that the compensation is to be calculated on the average profits of the three previous years next preceding "the purchase," so that we have to fix the time of "the purchase" mentioned in the section.

Now this word "purchase" in section 30 can conceivably refer to any one of the three following points of time, (a) the date of the notice, (b) the date at which the amount of the value is ascertained, or (c) the date of the completion of the purchase.

Mr. Justice Fulton decided in favour of the first of these three dates with the consequence I have stated, but with this neither party is satisfied. The section cannot claim to be free from obscurity, and I am inclined to think that the gentleman to whose pen it is attributed may not have appreciated those niceties of precise legal phraseology, which have been pressed on us in argument, and it may be that he intended the notice to be the crucial date for the purposes both of "the value" and "the compensation." Certainly the words "the purchase" were inserted of set purpose: they were not in the agreement, and doubtless were intended to remedy a defect. The result, however, has not been successful, and the section would seem to merit the description of being "one of those curative measures, not by any means confined to a single branch of science where the remedy is worse than the disease."

We are bound *prima facie* at any rate to assume that the words in common legal use have in the section their legal meaning. Now if this be so, then the

1904.

BOMBAY
TRAMWAY
COMPANY
v.
THE MUNICIPAL CORPORATION
OF BOMBAY

notice would not alone amount to a purchase even if we tested the relations constituted by reference to the exercise of an option. The amount of the value is according to the provisions of the Act to be ascertained by a special machinery, by a reference to arbitrators and their umpire, in case the parties do not agree; so that adopting for the sake of convenience the language applicable to contracts, there was not at the date of the notice a contract of sale or purchase for "the price is of the essence of a contract of sale": *Milnes v. Gery*.⁽¹⁾ In the course of his judgment in that case it was said by the Master of the Rolls, Sir William Grant, "upon the principle that a fixed price was an essential ingredient in a contract of sale, the ancient Roman lawyers doubted whether an agreement that did not settle the price was at all binding. Justinian's Institutes and the Code state that doubt, and resolve it by declaring that such an agreement should be valid and complete when and if the party to whom it was referred should fix the price; otherwise, it should be totally inoperative, *quasi nullo pretio statuto*; and such clearly is the law of England." The phraseology too of the section is, in my opinion, opposed to the view that a notice under it amounted to a purchase; for, what is provided is that upon notice being given the Corporation shall have a "right of purchase," that is the right of purchasing, which seems to point to a position *anterior* to the purchase.

I therefore think the first of the three theories must be rejected, so it remains to make a choice between the other two. If the case be rested, as the Tramway Company contends, solely on the Act then there is not of course a contract in the strict sense of the word; there is however a relationship to which for convenience the term "quasi contract" has been applied, and in the absence of provision to the contrary the ordinary rules, incidents and phraseology of a contract would apply. There can, I think, be no doubt that the word "purchase" may be legitimately used as a description of the position while the matter is still in contract. What was said by the Lords Justices in *Long v. Millar* ⁽²⁾ makes that clear. This too is in conformity with ordinary legal parlance, for though the words "purchase" and "purchaser" may technically imply an acquisition of property otherwise than by descent, in relation to a sale of land they are commonly used as appropriate to the stage prior to actual completion by conveyance or transfer. "Sale" and "purchase" are co-relative terms, and we find them both so applied. Thus, in the old common law court for the purchase-money of land it was in the form "money for a messuage and land sold and conveyed by the plaintiff to the defendant" (see Bullen and Leakes' Precedents of Pleading). So in our Court conditions of sale it is provided that the highest bidder shall be the purchaser, and provision is made for the purchaser doing a number of things prior to completion, while the last condition provides that if the "purchaser shall not pay his purchase money an order may be made for the resale of the property." This is in accordance with the phraseology of the common form

(1) (1807) 14 Vesey (Jun) 400 (408).

(2) (1879) 4 C. P. D. 450.

conditions of sale. So again in the Transfer of Property Act we find in section 55 the parties described as buyer and seller prior to completion. Similar instances could easily be multiplied, but it is unnecessary, for those I have cited show the sense in which the words "purchase" and "purchaser" and cognate expressions are commonly used. It is nothing to the purpose that section 54 of the Transfer of Property Act provides that a contract for the sale of immoveable property does not of itself create any interest in such property; the Act could have no direct application here. If for no other reason, because it did not come into force in this Presidency till 1893. It has been argued too that the expression in an earlier part of the section "in the event of such purchase" points to the words "the purchase" being used in sense other than the completion of the purchase; I am not, however, satisfied that this expression throws much light on the subject.

I have indicated what appears to me to be the ordinary meaning of the word "purchase" in a context like the present, and I have now to see whether there is any sufficient reason in this case, for referring it to the completion of the purchase.

In the first place it is an objection to that view that one has to add words that are not there, the words "the completion of." Then again if I am right in the opinion I have already expressed that the value and the compensation must be determined in relation to the same date, to hold that "purchase" means the date of completion would lead to a difficulty; for the compensation cannot be calculated until the value is ascertained, and if, as the Tramway Company contends, and as apart from special circumstances, I think is the case, the compensation must, as well as the value, be paid before completion there are all the materials for an obvious deadlock. This is so manifest as not to need elaboration. I do not say that completion would be impossible, but the position would certainly be one that lent itself to effective obstruction if there were a desire on either side to impede the transaction. I do not suggest that this is conclusive, but it at least shows that to treat "purchase" here as referring to completion has not the recommendation of convenience for what that may be worth.

In my opinion, therefore, the date of the purchase is the time when the amount of the value is fixed. It is true that the amount of the compensation may not then be ascertained, but that in my opinion would not prevent there being a purchase. There seems to me to be a clear distinction in this respect between the value and the compensation. There is no purchase until the former is ascertained because the amount is by the Legislature expressly made dependent on the arbitrament of certain individuals. It is otherwise as to the compensation, for the Act makes no provision for its ascertainment (in case the parties do not agree) otherwise than by the Court. The difference between the two cases is that in the one the Legislature has made the ascertainment of the quantum by arbitrators and their umpire of the essence of the transaction, and in the other the quantum is ascertainable by the Court. This distinction

1904.

BOMBAY
TRAMWAY
COMPANY
v.
THE MUNI-
CIPAL COR-
PORATION
OF BOMBAY.

1904.

BOMBAY
TRAMWAY
COMPANYv.
THE MUNI-
CIPAL COR-
PORATION
OF BOMBAY.

is pointedly drawn in *Milnes v. Gery*.⁽¹⁾ It may in conclusion point out that the construction I have placed on the Act involves no deadlock or even difficulty. If the date of the "purchase" is the ascertainment of the value then the compensation can be calculated afterwards in relation to that date.

On the question of the liability of the Tramway Company for track rent the judgment of the learned Chief Justice was as follows :—

In Appeal No. 1179 of 1901 three points have been submitted for our decision : (1) when does the ownership in the purchased assets pass ? (2) On the notice did the agreement of 1873 come to an end ? And (3) If not, did the Tramway Company's liability to pay track rent under the agreement cease in consequence of the correspondence between the Municipal Commissioner and the Tramway Company ? The first of these questions calls for no discussion now as it is agreed on both sides that the ownership does not pass until conveyance ; so I will pass on at once to the second topic of discussion, did the agreement come to an end ? Mr. Justice Fulton has held in the affirmative. In support of this conclusion the Tramway Company has principally relied on the first sentence of clause 15 and the concluding words of clause 16 of the agreement. The implication of those two passages, it is said, is that in the event of the Municipality declaring its intention to purchase the property, the terms of the contract come to an end. This point derives its importance from the fact that the Tramway Company, on the footing that the agreement has come to an end, claims exemption from all track rent subsequent to the notice, and the consequence of this is that not only is there a loss of the track rent which comes to about Rs. 50,000 a year, but the average profits on which the compensation has to be calculated will be proportionately increased with the result that the amount of the compensation may be augmented by a sum of 10 lacs, or so. It is not therefore a matter of surprise that this point has been hotly contested before us. The Tramway Company's case is shortly this, the track rent is only payable under the agreement, the agreement has come to an end ; if not, then the liability to pay track rent was released by the Municipal Commissioner ; the Municipal Commissioner was entitled to give this release, if not, the Corporation is estopped from denying his power.

The first question is whether we ought at this stage to give any decision on the point. I am of opinion that in the view Mr. Justice Fulton took of the date of "the purchase," the question did not arise for decision. Further than that I think that as he considered it necessary to rely on the doctrine of estoppel as against the Corporation, he had not before him materials on which that estoppel could be based. This is practically conceded by the Tramway Company, who has applied to be allowed to adduce evidence on this point. In the view, however, that I take of the date of "the purchase," the determination of the

(1) (1807) 14 Vesey (Jun.) 400 (406).

tramway's liability for track rent does arise as it is essential to the account of profits that has been directed for the purpose of ascertaining the amount of the compensation. The only question has been, whether we should at this stage decide the matter or allow it to remain over until an application is made to vary the Commissioner's report; either course was open to us according to the practice of this Court. Having regard, however, to the probable destination of this suit, we thought the former would be the better course, it became therefore necessary to deal with the Tramway Company's application to supplement its evidence as to estoppel.

The Tramway Company before Mr. Justice Fulton protested against the determination in this suit, or at any rate at this stage, of its liability for track rent for it was a case not made or (having regard to the dates) capable of being made in the pleadings, and as a result the Tramway Company was not prepared with the requisite evidence. Under the circumstances we thought their application a reasonable one, and that it should be granted.

The Tramway Company has accordingly supplemented its evidence on the head of estoppel. What has happened is that subsequently to the notice of the Corporation's intention to purchase, the Tramway Company has continued to work the undertaking, and first I propose to consider what is its position in so doing under the Act and the agreement apart from the correspondence with the Municipal Commissioner. I have already stated the general character of the Tramway Company's argument and the import ascribed to clauses 15 and 16 of the agreement. The correctness of this view has been strenuously combated by the Corporation: it is urged that it is contrary to the Tramway Company's claim for exemption of its horses, carriages and vehicles from municipal taxation under section 12 of the Tramways Act, and that the concession in respect of which the yearly rent is reserved by clause 18 of the agreement is still enjoyed. For the moment, however, I will assume that the sense the Tramway Company seeks to impose on the 15th and 16th clauses is correct, in so far as it would read into the sections the meaning that the agreement is to come to an end on the happening of an event not mentioned but indicated in the 16th clause. But then we have to see what that event is. The event actually mentioned is the Municipality's failing to declare its intention "as above provided"; the event therefore to be implied is the Municipality's declaring its intention "as above provided" *i. e.*, as provided in the agreement. But according to the argument advanced by the Tramway Company in another connection it was not under the agreement but under the Act that the Municipality declared its intention. If this be the true view then it affords a complete answer to the Tramway Company's argument. But it is not enough that the Tramway Company advanced that argument in another part of the case: we must be satisfied that it is right, and that I will now consider. Substantially the 15th clause and the 30th section are in the same terms though there are certain minor differences; thus the first sentence of the clause is absent from the section while the clause does not contain the words "*the purchase*" so much discussed in Appeal No. 1181. Turning to the

1904.

BOMBAY
TRAMWAY
COMPANY
v.
THE MUNI-
CIPAL COR-
PORATION
OF BOMBAY.

1904.

BOMBAY
TRAMWAY
COMPANY
v.
THE MUNI-
CIPAL COR-
PORATION
OF BOMBAY.

Corporation's resolutions, I find in them no reference to the agreement but only to the Act. The resolution of 28th February, 1901, was that the Municipal Commissioner "be authorized to give legal notice to the Bombay Tramway Company of the Corporation's intention to exercise the right of the purchase of the tramways given to them by section 30 of the Bombay Tramways Act I of 1874, which intention the Corporation hereby declare": while the resolution of the 11th March was "the Corporation further authorize and direct the issue and service on the Bombay Tramway Company, Limited, of all necessary notices declaring the intention of the Corporation to exercise the power of purchase of the tramways pursuant to section 30 of the Bombay Tramways Act, 1874." It is true that the Municipal Commissioner's notice mentions the agreement as well as the Act, but to that extent it went beyond the resolution and on the whole I think that so far as the Municipality is concerned, the only intention declared was under the Act. Further, I do not think a declaration under the agreement would have been of any use. In the first place it is at least doubtful whether the right of purchase contained in the agreement was not bad on the ground that it created a perpetuity; for it may be that so far as the matter rested on contract a decision by arbitrators was not necessarily of its essence. [*London and South-Western Railway Co. v. Gomm* ⁽¹⁾ and *Manchester Ship Canal Company v. Manchester Racecourse Company* ⁽²⁾] Next, I am aware of no power vested in the Corporation that would enable it to purchase otherwise than under the special authority of the Tramways Act. The validity, therefore, of clause 15 is at least open to question. But in any case I am of opinion that the clause was superseded by section 30 of the Act: the Act does not purport to keep it alive: it substantially reproduces its terms as an independent provision, and in my opinion it must have been intended that the imperfect rights under the agreement so far as they had any existence, should be merged in, and extinguished by, the rights created by section 30 of the Act.

So far I have proceeded on the assumption of the interpretation that the Tramway Company seeks to put on clauses 15 and 16 of the agreement, but I do not wish it to be supposed that I accept that view, for I have not been as yet convinced by the arguments advanced in support of it. The rent was reserved in consideration of the concession expressed to be granted by the agreement; that concession was based on the property or interest the Corporation's predecessors had in the soil on which the physical structure of the tramways was laid; that property or interest is now vested in the Corporation, and the benefits of the concession are being enjoyed by the Tramway Company, and it would require very clear language to determine the obligation to pay rent during the continuance of that relationship. I can find no such language in the agreement or the Act. In my opinion, therefore, there is nothing either in the Act or agreement which under the circumstances operated to determine the Tramway Company's liability for track rent as a consequence of the notice given.

(1) (1882) 20 Ch. D. 562.

(2) (1900) 2 Ch. 352 (362); (1901) 2 Ch. 37.

But then it is said that the correspondence with the Municipal Commissioner exempted the Tramway Company from this liability.

After reading the correspondence, the learned Chief Justice continued :—

As Mr. Justice Fulton held that the agreement had come to an end, he approached this correspondence from a different standpoint from that which I start. He had to see whether the correspondence imposed a liability which otherwise would not exist; I have to enquire whether the correspondence exempts the Tramway Company from a liability which would otherwise exist. But before dealing with the correspondence there is one matter to which I must briefly allude. In the course of the argument there was a suggestion that there had been that which amounted to fraud on the part of the Tramway Company in connection with this correspondence. We did not permit this point to be pursued, because no such case had been alleged before, but it is only right that I should say that in my opinion there is absolutely no foundation for the suggestion; the conduct of the Tramway Company and its manager, Mr. Rimington, has throughout been straightforward and wholly free from anything reprehensible. But to return to the matter in hand, what is there in this correspondence which gives the Tramway Company the exemption it claims? No doubt in its letter of the 12th the Tramway Company stipulates that the agreement is without prejudice to any of its legal rights. That would have been of value if apart from the correspondence the liability had ceased, but as I have held otherwise the argument has no force. What precisely was the effect of the words "without prejudice to any of the Company's legal rights" is not clear; for the Tramway Company was forced to assert that the agreement did interfere with its right to discontinue work, as otherwise there would be no consideration to support the agreement, and it is on this asserted curtailment of its rights that the Tramway Company relies. Then stress was laid on the stipulation that the Tramway Company was to receive and *enjoy the income and profits* of the Tramway business during the agreed period. So we have to see what is the meaning of those words. In *Lawless v. Sullivan* (1) it was laid down by their Lordships of the Privy Council that "there can be no doubt that, in the natural and ordinary meaning of language, the income of a bank or trade for any given year would be understood to be the gain, if any, resulting from the balance of the profits and losses of the business in that year." In *Mersey Docks v. Lucas* (2) Lord Selborne deals thus with the expression "profits of the concern": "if we had nothing more than that, I should have thought that we were to consider, not the application of the moneys which the Mersey Board received when they had received them, but the 'profits of the concern' in the sense of the produce or value which could properly be described as 'profit of the concern' and that surely would be all the net proceeds of the concern after deducting the necessary out-

1904.

BOMBAY
TRAMWAY
COMPANYv.
THE MUNI-
CIPAL COR-
PORATION
OF BOMBAY.

(1) (1881) 6 App. Cas. 373 (378).

(2) (1883) 8 App. Cas. 591 (903).

1904.

BOMBAY
TRAMWAY
COMPANY
v.
THE MUNI-
CIPAL COR-
PORATION
OF BOMBAY.

goings without which those proceeds could not be earned or received." I do not cite these opinions as authorities binding in this case, for I am conscious that they were expressed in relation to a different subject-matter from that now before us, and in a different context, but I refer to them as weighty opinions as to the ordinary meaning, first of the word 'income' and next of the word 'profit.' That meaning is in each case opposed to the Tramway Company's contention. But then it is urged that here we have the two words in collocation and that some force should be given to that. It is a common practice to couple the word 'profits' with cognate words: thus the expression "rents and profits" is in common use, and it would take much to convince me that the use of the word 'profits' in conjunction with the word 'income' in this letter means gross profits so as to entitle the Tramway Company to an exemption it would not otherwise possess.

I feel the more strongly in this case that this cannot be the force of the word 'profit' as here used, from the rest of the correspondence. Thus the use of the words 'continue' and 'continuance' suggests an adhesion to the old terms, and to my mind there is the strongest indication in the Tramway Company's letter of the 12th that this was to be so. After stating the Tramway Company's willingness to continue the work on the understanding that it is to receive and enjoy the income and profits of the Tramway business, the letter proceeds: "In fact, I am advised that the Company is legally entitled to do so." What that advice was does not appear. This letter was an offer by the Tramway Company, and it was accepted by the Municipal Commissioner. The question then is what was hereby offered? To determine this what we are concerned with is not so much the real as the manifest intention of the parties, or in other words, their intention as disclosed by the language used. The reasonable construction to place on the words is that the Tramway Company's offer was to continue working in accordance with their legal rights and responsibilities, and in my opinion the Municipal Commissioner was justified in accepting the words in that sense, nor is it suggested he did not. What then, apart from the correspondence, were those legal rights, and what responsibilities? On that I have already given my decision, and I must, for the purposes of this judgment, assume that it is correct. The result is that in my opinion there is nothing in the correspondence to exempt the Tramway Company from payment of track rent. This is the view I take of the correspondence, but even if it be not correct I still think the Tramway Company's contention must fail; for to adopt the language of the Privy Council in *Falch v. Williams* (1) it was the duty of the Tramway Company to make out that the construction which it put on the correspondence is the true one. In that it must fail if the offer was ambiguous, as I hold it to be, in case it does not bear the sense I have imposed on it.

Under these circumstances it is unnecessary to consider how far the Municipal Commissioner had authority to bind the Corporation in relation to the track rent, or whether the Corporation is estopped from disputing his authority.

(1) (1900) A. C. 176 (181).

18th February 1902.

We have heard further argument as to the date in reference to which the value is to be ascertained and as to the incidence of costs here and in the first Court.

On the first point I adhere to the opinion I originally expressed, that the value must be ascertained in reference to the date of the valuation. The Act is not specific on the point, but on a consideration of all the circumstances that is, in my opinion, the most reasonable period to which to refer the valuation, more especially if the Tramway Company is entitled (as I think it is) to continue working under the Act notwithstanding the notice.

The Corporation having waived all claim to assets acquired after the date of their notice on the 14th March, 1901, the valuation will be of the rest of the assets, *i.e.*, the tramway and the works and materials connected therewith, and the lands, buildings, and all other property of the tramway in existence at the date of valuation, exclusive of those acquired after the 14th March, 1901, and the value must be ascertained as at the date of the valuation, *i.e.*, of the award declaring the value.

The result, then, is that the suit must be dismissed so far as it seeks a declaration that the Corporation has failed to exercise its option of declaring its intention to purchase the Tramway Company's property and business, and is not entitled to exercise such option for a period of another seven years after the 12th May, 1901, and also so far as it seeks a declaration that the Corporation has not acquired the right to purchase the Tramway Company's property and business and consequential relief. Mr. Justice Fulton's decree must be varied so far as it declares that the 14th day of March, 1901, is the date of the purchase, and that the ownership of the property passed to the first defendant on the 14th of March, 1901, and that the three years next preceding the purchase ended on the 14th of March, 1901, and in substitution thereof there should be a declaration that the date of the valuation is the date of the purchase, and that the ownership of the property will pass on the assurance thereof and that the three years next preceding the purchase will end on the date of the valuation.

We vary Mr. Justice Fulton's finding on the fifth, twelfth, and fourteenth issues by declaring that the plaintiffs' liability to pay track rent did not cease on the 14th of March, 1901.

STARLING, J.:—The next point to be considered is whether the notice of purchase is not bad in law owing to the purchase being made with the intention of resale, the power of resale not having, it is urged, been given to the Municipality by the Act. This depends upon the construction which is to be put on sections 30 and 31 of the Act. These two sections were doubtless suggested by sections 43 and 44 of the English Tramways Act, 1870, but they were not copied from them as argued on behalf of the Tramway Company. Mr. Inverarity drew our attention to the fact that in the English Act power was given in section 43 to the purchasing authority to deal with

1904.

BOMBAY
TRAMWAY
COMPANY
v.
THE MUNI-
CIPAL COR-
PORATION
OF BOMBAY.

1904.

BOMBAY
TRAMWAY
COMPANY
v.
THE MUNI-
CIPAL COR-
PORATION
OF BOMBAY.

the purchased undertaking in the same way as the promoters were entitled to do, a power which was omitted from section 30, and argued therefrom that if the Municipality bought the tramway they would have no power to work or sell it. It would require very strong proof to induce me to hold that the Legislature deliberately intended to give the Municipality power to buy the tramway, paying a very large sum for it as a going undertaking and to prevent them doing anything with it but sell the land and the stock and the rails as old materials. It is to be remarked, however, that section 30 of the Bombay Act omits other provisions of the English Act, section 43 among others. The section in the English Act contains a provision requiring the promoters to sell the undertaking to the local authority which section 30 does not contain, and consequently it might be said that although the Municipality had the right to buy, the Tramway Company could not be compelled to sell. The latter, however, had already agreed to sell, and there was no necessity for a provision to that effect in the Act. Again, in section 44 of the English Act power was given to the local authority to purchase at any time under certain conditions if the promoters were willing to sell, and this provision is not repeated in section 31 of the Bombay Act. Therefore I hold that the fact that section 30 omits the provisions of section 43 of the English Act enabling the local authority purchasing at the end of certain periods to deal with the undertaking in the same way as the promoters could, does not show that when the Municipality buy the tramway undertaking they can neither work nor resell it. The Court must look at the Bombay Act as it stands without reference to the English Act, and find out from the words used and the surrounding circumstances what it means. Looking at these two sections in this way, it seems to me that section 30 gives power to the Municipality to buy the tramway undertaking on certain terms. Mr. Inverarity called it a compulsory purchase, but it is not so. The Act only ratifies and gives legislative sanction to the prior agreement which had already been entered into between the grantees and the Justices of the Peace by which the grantees had agreed that the Municipality should be at liberty to buy the tramway undertaking at certain times. Section 31 then gives power to the grantees to sell, not only to the Municipality, but to any one including of course the Municipality. Mr. Inverarity argued that this only applied to voluntary sales, and that if the present was to be considered a voluntary sale the Tramway Company would refuse to sell, but they had already agreed to sell under certain conditions and when those conditions were fulfilled the sale was a voluntary one which they could not refuse to perform. Under these circumstances I hold that the latter part of the section transferring the powers and rights of the grantees to the purchaser gives the Municipality power to work and power to resell. Supposing, however, that this is a compulsory purchase given by the Act. The Act is the charter of incorporation of the Tramway Company, has been accepted by them and they have been working under it. Consequently they must be held to have agreed to this liability to compulsory purchase being imposed on them. In my view of these two sections, section 30 gives the power to the Municipality to purchase at certain times, and section 31 gives the Tramway Company power

to sell then or at any other time and to sell to the Municipality or to any other corporation or person. Consequently, whichever way you look at the matter, the Municipality has power under the latter portion of the 31st section to work or resell the undertaking, and the notice of their intention to purchase is not bad because it is given with the intention of reselling.

It was then urged that the notice was not given on behalf of the Municipality, but as agents for someone else. It does not seem to me that this is the case. The Municipality had power to purchase and resell. They wanted electric traction to be introduced on the tramway and they also wanted electric light and power to be introduced into the City and they considered that to get some person or body to take up all three matters would be the best thing to be done. It is not strongly urged that assuming the Municipality had power to resell, it would have been illegal for them to have bought the tramway and immediately afterwards sold it to a company who would have introduced electric traction, light and power, but it is argued that it was illegal for them to arrange beforehand to get this done and then, in pursuance of an agreement to that effect, give notice of purchase to the Tramway Company. It seems to me that there is no illegality in this procedure and that it was the most prudent thing the Municipality could do and that in principle the matter is covered by the decision of the House of Lords in *Galloway v. Mayor and Commonalty of London*.⁽¹⁾

The notice served on the 14th March, 1901; this being a good notice what was the effect of it? Mr. Inverarity argued that it defined the undertaking of the Tramway Company as it stood on the 14th March as the subject-matter of the intended purchase and that the undertaking was, in estimating the price to be paid for it, to be valued as it stood on that day. To this argument Mr. Lowndes, as I understood him for the Municipality, assented. If this be so there is on this point nothing for the Court to decide, but I wish to guard myself from it, being thought that, without further argument, I agree to this proposition. The notice itself, however, does not effect a purchase of the undertaking, for the contract cannot be complete until a price has been fixed, and that cannot be done until the value has been ascertained by arbitration under the terms of section 30. When that has been ascertained the date of its ascertainment by the arbitrators will be the date of purchase [see *Regent's Canal Company v. Ware* (2)]. That date will consequently be the time up to which the profits for the three years next preceding the purchase will have to be calculated. These two sums, namely, the value of the undertaking and the compensation, are the price which is to be paid for the purchase and on payment or tender thereof the Municipality will be entitled to possession of the undertaking and to a conveyance thereof, on which the property will pass to them.

The last question to be dealt with is that of track rent since the 14th March last. In this suit the Court cannot pass any decree for the payment of track

1904.

BOMBAY
TRAMWAY
COMPANY
v.
THE MUNI-
CIPAL COR-
PORATION
OF BOMBAY.

(1) (1866) L. R. 1. H. L. 34.

(2) (1857) 23 Beav. 575.

1904.

BOMBAY
TRAMWAY
COMPANYv.
THE MUNI-
CIPAL COR-
PORATION
OF BOMBAY.

rent as the question is not raised in the pleadings; but both parties having assented to the amount of compensation being determined by the Commissioner of this Court, it becomes necessary for the Court at some time or other to give him directions as to some of the items which he will have to take into account in estimating the profits made by the Tramway Company during the three years next preceding the purchase by the Municipality. One of those items, the interest on debentures, has been decided by the lower Court and has not been appealed against. Another which this Court has to decide is whether the Company is liable to pay track rent since the date of the notice to purchase. On this point Mr. Inverarity in argument endeavoured to separate between the agreement and the Act, and argued that although the Act was still in force the agreement ceased to be in operation from the date of the notice to purchase. I must confess that if his arguments have any weight I have failed to appreciate them. The agreement was first made and was a necessary step to be taken as the roads were vested in the Justices, but it could not be acted upon without legislative authority; consequently the Legislature passed the Tramway Act which to my mind incorporates, though not in so many words, the agreement, except so far as it may be inconsistent with the Act. The Act confers the right to make and maintain certain tramways subject to the provisions of the agreement, and so long as the Company are in possession of the tramway I do not see any reason why the agreement should not be held to be in full force. The concession is a concession of the right to make and maintain tramways, so far as the Justices were able to grant it, over the roads vested in them, and although an Act of the Legislature was necessary to enable the tramway to take full advantage of that concession, yet I take it that the Legislature would not have granted the full power without the sanction of the Justices. Consequently in my opinion so long as the Municipality do nothing to prevent the Company maintaining the tramway, the concession is in force and consequently the agreement to pay track rent. But it is argued that the notice to purchase puts an end to the concession because the Company cannot after it do as they like with the undertaking. It does not interfere with their maintaining and working the tramway and taking the profits thereof so long as the Municipality does not put itself in a position to demand possession of the undertaking, and so long as they maintain and work the tramway it is only right that they should pay track rent. What would be the result if the Company said they would not maintain or work the tramway I do not pause to enquire, as the undertaking is a highly profitable one, and such an event is not likely to occur. There is no provision in the agreement as to the time when it is to come to an end, nor is it even provided therein that it is to come to an end when notice to purchase is given, and the agreement is so loosely drawn that it is, to my mind, impossible to say that, because clause 16 provides that if no notice is given the contract shall continue in force, therefore if notice is given it is no longer to be in force.

Then does the correspondence which took place between the Municipal commissioner and the Company between the 11th and 13th March, 1901, in any

way alter the liability of the Company to pay track rent? It is to be noted that with reference to the future action of the Company both sides use the words "continuance of working," "will continue to work," which certainly point to a maintaining of the *status quo ante*, and in my opinion any businessman reading those words would infer that everything was to go on as it had been before the notice, including payment of track rent. Does, then, the use of the words "income and profit" alter the significance which is to be given to the word "continue?" I think not. Income may mean gross income, gross receipts, but it more ordinarily means what is received and available after the payment of all charges and expenses. There has been no suggestion anywhere as far as I can remember that at the time Mr. Rimington wrote the letter of the 12th March he deliberately intended by the word "income" to mean "gross receipts." If it were so proved I should hold that that word as used was not apt to convey to the mind of the Municipal Commissioner that the Company claimed no longer to pay track rent. It is clear the Commissioner did not so understand it, and under the circumstances there would be no agreement that the Company should no longer pay track rent, and the Company would be remitted to their position under the original agreement. Consequently in taking an account of the average profits for three years the Commissioner will have to take into account the amount of track rent payable by the Company to the Municipality. Our finding in respect of the payment of track rent being against the Tramway Company both on the agreement and the letters, the question as to whether the agreement contained in the letters was binding on the Corporation does not arise and there is no necessity to discuss the evidence given at the end of the hearing of these appeals.

This case has now been re-argued on the question of the time at which the valuation of the undertaking is to be made, and although there are difficulties which are sure to arise whichever date is taken, I am of opinion that the one which is open to the least objection is the date of valuation, *i.e.*, the date on which the arbitrators make and publish their award, and that the tramway undertaking as it existed on the 14th March, 1901, or so much thereof as is still in existence at the time of the valuation being made should be valued as of the date of valuation.

On this appeal,

Mr. Jardine, K. C., and *Mr. G. E. A. Ross* for the appellants contended, first, that the notice given by the respondents was not such a notice as was contemplated by section 30 of Bombay Act I of 1874. That section was taken from section 43 of the English Tramways Act, 1870, but by the section of the English Act power was given to the purchasers to deal with the tramway undertaking when they had purchased it, in the same way as the vendors (the promoters of the undertaking) had been entitled to do, and that provision was omitted from section 30 of the Bombay Tramways

1904.

BOMBAY
TRAMWAY
COMPANY
v.
THE MUNI-
CIPAL COR-
PORATION
OF BOMBAY.

1904.

BOMBAY
TRAMWAY
COMPANY
v.
THE MUNI-
CIPAL COR-
PORATION
OF BOMBAY.

Act of 1874, so that the respondents had under that section no power to purchase the tramways with the view of transferring the undertaking to others. But the notice of intention to purchase was given under an agreement with, and with the object of transferring the undertaking to, Bingham. The respondents have thus exceeded their powers under Act I of 1874, and the decision appealed from was wrong in finding that the notice with the above object and intention was good and that the respondents had not acted illegally.

Secondly, it was contended that the Appellate Bench of the High Court was wrong in holding that the fixing of the value and the compensation were to be referred to the same date; and it was submitted that the period of three years enacted by section 30 of Act I of 1874 for calculating the profits of the appellants for the purpose of ascertaining the amount to be paid for compensation should have been held to have ended on the date of the "completion of the purchase." This would be a later date than that fixed by the High Court which was the date of the "purchase", and this was held to be the date when the amount of the value was fixed.

Thirdly, it was contended that the Court below was wrong in holding that the appellants were liable to pay track rent after the date of the notice of intention to purchase. The liability to pay track rent, it was submitted, came to an end when the agreement ceased to be in force; and by clause 16 of the Agreement if no notice were given the agreement was to remain in operation: the effect of the notice therefore was impliedly to terminate it. The agreement was not superseded by section 30 of Act I of 1874. Even if this were not so the liability to pay track rent would, at any rate, cease after the agreement had been come to by which the appellants agreed to work the tramways until the completion of the purchase; in other words, the effect of the correspondence which constituted that agreement was to release the appellants from payment of the track rent. Under that agreement the appellants were entitled to "receive and enjoy" the income "and profits" of the tramway business; and it was submitted that the expression "income and profits" meant the "gross profits" without deduction.

Mr. Cohen, K. C., Mr. Haldane, K. C., and Mr. A. Phillips for the respondents were not heard.

Mr. G. D. Lynch watched the case on behalf of the trustees of the debenture-holders.

The judgment of their Lordships was, on the 3rd June, 1904, delivered by—

1904.
BOMBAY
TRAMWAY
COMPANY
v.
THE MUNI-
CIPAL COR-
PORATION
OF BOMBAY.

LORD LINDLEY :—The questions raised by this appeal arise out of a purchase by the Corporation of the City of Bombay of the undertaking of the Bombay Tramway Company. The purchase was made under the provisions of section 30 of the Bombay Tramways Act, 1874 (Bombay Act I of 1874). This section is as follows :—

“The said Municipal Corporation of the City of Bombay shall have the right of purchasing the said tramways with the plant, stores, rolling-stock and everything connected therewith after the expiration of twenty-one years from the 12th day of March, 1873, upon declaring its intention so to do within six months after the expiration of the said twenty-one years, and shall have a renewed right of purchase at the end of every seven years after the expiration of the said twenty-one years upon similar notice being given ; the amount to be paid in the event of such purchase shall be the actual *bond fide* value (exclusive of any compensation for goodwill, premium, or compulsory sale or other consideration whatsoever) of the tramways and of the works and materials connected therewith and of the lands and buildings and all other the property of the Grantees, such value in case the parties do not agree to be decided by arbitration as provided by the said Agreement of the 12th day of March, 1873 ; and as compensation for the goodwill, premium, or compulsory sale and other consideration, the Grantees shall be paid an amount equal to twenty-one years' purchase calculated on the average profits of the previous three years next preceding the purchase, 4 per cent. per annum on the *bond fide* value mentioned above being first deducted from such profits.”

On the 11th March, 1901, the Corporation served notice of their intention to purchase the Tramway Company's undertaking ; but there being some doubt whether this notice was regular in point of time two other notices, dated respectively the 12th and 13th March, 1901, were afterwards served, and it is now admitted that no objection on the ground of date has to be considered.

The Tramway Company, however, contend that the notice is altogether invalid because the Corporation are acting beyond their powers, *viz.*, not for themselves but for and on behalf and

1904.

BOMBAY
TRAMWAY
COMPANY
v.
THE MUNI-
CIPAL COR-
PORATION
OF BOMBAY.

on account of a person named Bingham. When the facts are investigated it appears that although the Corporation have made arrangements with Bingham by which he is to find the money for the purchase, and to work the tramways when acquired by the Corporation, yet the Corporation are acting as principals and not as Bingham's agents. There is nothing in the Tramways Act which expressly or impliedly prohibits such a transaction; nothing to show that if the Corporation exercise the power conferred on them by section 30 and acquire the tramways, they are bound to keep them in their own hands and to work them themselves. Whether they can carry out their agreement with Bingham without obtaining further powers is a matter which does not concern the Tramway Company. This point was elaborately dealt with both by the Judge of First Instance and by the learned Chief Justice of Bombay; and their Lordships think it unnecessary to say more than that they are satisfied that on this point the judgment appealed from was perfectly correct.

Then another question was raised by the Tramway Company which was that the date to be fixed as the date of taking the purchase ought to be later than that mentioned in the judgment. If the proper date had to be determined by their Lordships unembarrassed by what took place in India, their Lordships would have thought that the proper date to be fixed would have been when the relation of vendor and purchaser was definitely created by the service of a proper notice to purchase, *i.e.*, in this case the 14th March, 1901. This was the view taken by the Judge of First Instance, Mr. Justice Fulton. But for some reason, which their Lordships do not appreciate, both parties appealed against his decision and contended before the Appellate Court for a different date. Having regard to the course taken by both parties in the Court below, their Lordships do not consider that either party without the consent of the other can fairly insist now that the above date ought to be adopted. Under these circumstances their Lordships see no reason for disturbing the date fixed by the Appellate Court, *i.e.*, the date of the award fixing the value of the corporeal property of the Tramway Company. As pointed out both by Mr. Justice Fulton and the Chief Justice, to fix the date of the execution of the conveyance

would lead to great practical difficulties. The profits would vary from day to day and the average profits for three years could never be ascertained.

Another point contended for by the Tramway Company was that what is called track rent payable to the Corporation ought to cease on the 14th March, 1901. This contention is, however, disposed of by the fact that in March, 1901, it was expressly agreed between the Tramway Company and the Corporation that the Tramway Company would continue to work the tramways pending the ascertainment and payment of the purchase-money on the understanding that they received "the income and profits of the tramway business during such period." It is plain that so long as the Tramway take the profits, they must pay the ordinary expenses of working and the rent in question.

Their Lordships will therefore humbly advise His Majesty to dismiss this appeal and the appellant Company must pay the costs of the Corporation.

Appeal dismissed.

Solicitors for the appellants—*Messrs. Blount, Lynch and Petre.*

Solicitors for the respondents—*Mr. Edm. Ward Oliver (for Messrs. Crawford, Brown, Bayley & Dunlop, Bombay.)*

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Batty.

ANTONE VALAD ZUJE PREL AND OTHERS (ORIGINAL PLAINTIFFS),
APPELLANTS, v. ADMINISTRATOR GENERAL OF BOMBAY, AS
ADMINISTRATOR OF THE ESTATE AND EFFECTS OF HAJI TYAB GUNI AND
OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

*Bombay Civil Courts Act (XIV of 1869), section 32—Civil Court—
Jurisdiction—Suit against Administrator General.*

A suit against the Administrator General as representing the estate of a deceased private individual must be brought in the District Court and not in the Court of a Subordinate Judge, by virtue of section 32 of the Bombay Civil Courts Act (XIV of 1869).

SECOND APPEAL from the decision of D. G. Gharpure, Additional Joint First Class Subordinate Judge, Appellate Powers, at Thána,

* Second Appeal No. 539 of 1903.

1904.

BOMBAY
TRAMWAY
COMPANY
v
THE MUNI-
CIPAL COR-
PORATION
OF BOMBAY.

1904.

June 13.

1904.

ANTONE
v.
ADMINISTRATOR GENERAL
OF BOMBAY.

reversing the decree passed by N. N. Nanavati, First Class Subordinate Judge at Thána.

The plaintiffs brought this suit in the Court of the First Class Subordinate Judge at Thána, to recover possession of a plot of land at Kurla. They stated that the land in question was leased from them on the 15th August, 1874, by the deceased Jusaf Haji Guni for a factory at an annual rent of Rs. 50; that Jusaf passed to them on the 28th idem a registered lease in respect of the tenancy, and that they received rent in respect of the property till the 15th August, 1895, from Jusaf and his heirs, Tyab and Kusum. Tyab having died, the Administrator General was brought in as representing his estate. The prayer of the plaintiffs was that the possession of the land be awarded to them.

The Administrator General contended, *inter alia*, that under the agreement of the 28th August, 1874, Jusaf Haji and his heirs were entitled to hold the land in suit in perpetuity, subject only to the payment of the annual rent of Rs. 50; that the lease could not be cancelled, provided the rent was paid, and that he was willing to pay his share of the rent.

The Subordinate Judge decreed the suit in plaintiffs' favour by awarding the disputed land into their possession.

On appeal the defendant raised the point, whether the Subordinate Judge had jurisdiction to entertain the suit under section 32 of Act XIV of 1869, considering that one of the defendants was the Administrator General. This point was decided in the negative for the following reasons:—

“It is not contested that the Administrator General of Bombay is an officer of Government (*vide* section 5 of Act II of 1874). But it is contended that he represents a private estate. But he does so in his official capacity and he is sued expressly in such capacity. In his private capacity he has no *locus standi*. I therefore hold that the lower Court had no jurisdiction.”

The plaintiffs preferred a second appeal.

M. V. Bhat, for the appellants:—There is no cause of action alleged in the plaint as against the Administrator General. My clients sue to recover possession, alleging that the deceased Tyab Haji Guni was their tenant liable to pay rent; that he, and his heirs after his death, failed to pay rent and that consequently

1904.

ANTONE
v.
ADMINISTRATOR GENERAL
OF BOMBAY.

they were entitled to possession. The capacity in which the Administrator General is sued is his capacity as Administrator to the estate of the deceased Tyab Haji—a capacity which might have belonged to him even though he had not been the Administrator General of Bombay, for the Court might, in certain cases, have appointed any person other than the Administrator General as Administrator to the estate of the deceased person.

It has been held that a Collector or Názir appointed to manage the estate of a minor can be sued in the Court of a Subordinate Judge: see *Mohan Ishwar v. Haku Rupa and Man Rupa* ⁽¹⁾; *Anantharaman v. Ramasami*.⁽²⁾

H. C. Coyaji, for the respondents:—The Subordinate Judge had no jurisdiction to entertain this suit (section 32, Bombay Civil Courts Act, 1869). The Administrator General of Bombay is an “officer of Government,” and he is sued in this case “in his official capacity.” The provisions of the Administrator General’s Act, 1874, show clearly that he is an “officer of Government”; he is appointed, and may be suspended or removed by the Government of Bombay (section 5); he is not an officer of the High Court (section 7); he cannot hold any other office without sanction of Government (section 9); and he gives security to the Secretary of State for India for the due execution of his office (section 11). The fact that in this case he is sued as representing what is called a private estate does not make him any the less an “officer of Government.” In *Narsingrav Ramchandra v. Luxumanrav*,⁽³⁾ it was held that the Collector who was appointed to take charge of the estate of a minor under Act XX of 1864 is appointed in his capacity as Collector, and is therefore an officer of Government within the meaning of Act XIV of 1869, section 32. The case of the Názir of a Civil Court who is appointed guardian of the estate of a minor is distinguishable: see *Mohan Ishwar v. Haku Rupa and Man Rupa*.⁽¹⁾ The Official Assignee is a public officer within the meaning of sections 2 and 424 of the Civil Procedure Code: see *Joosub Haji v. N. W.*

(1) (1880) 4 Bom. 638.

(2) (1888) 11 Mad. 317.

(3) (1876) 1 Bom. 318.

1904.

ANTONIE
v.
ADMINISTRATOR GENERAL
OF BOMBAY.

Kemp⁽¹⁾, *Shahabzadee Shahunshah Begum* v. *Fergusson*⁽²⁾, and *Abdul Lateef* v. *Doutre*.⁽³⁾

CHANDAVARKAR, J.:—The question in this second appeal is whether the suit, having been brought against the Administrator General as one of the defendants, was wrongly instituted in the Court of the Second Class Subordinate Judge instead of the District Court. Section 32 of the Bombay Civil Courts Act, 1869, provides:—"No Subordinate Judge or Court of Small Causes shall receive or register a suit in which the Government or any officer of Government in his official capacity is a party." There can be no question that the Administrator General is an officer of Government, but it is urged by the appellants' pleader that the Administrator General is not a party to the suit in his official capacity, because he is sued simply as representing the estate of a private individual. But such representative capacity is filled by the Administrator General in virtue of his official capacity; the duty of representing the estate of a deceased person under certain circumstances devolves upon him as a public officer under an Act of the Legislature which defines his powers and responsibilities as such officer. No distinction, therefore, can be made between his official capacity and his representative capacity, the latter being merged in the former. But it was further urged that the cause of action on which the suit was brought was one arising not from any act of the Administrator General, but from an act of the deceased person whose estate he represented. It is true that the plaintiffs sue to recover possession, alleging in their plaint that the deceased was their tenant, liable to pay rent, and that, according to the terms of the lease, the plaintiffs have become entitled to possession in consequence of failure on the part of the deceased when he was alive, and on the part of his heirs on his death, to pay rent. But substantially, the plaintiffs' complaint is that there has been failure on the part of the Administrator General after he came into possession of the land either to pay rent or to deliver possession to the plaintiffs. The suit as against him

(1) (1902) 26 Bom. 809.

(2) (1881) 7 Cal. 429.

(3) (1889) 12 Mad. 250.

must, therefore, be treated as one brought for an act of wrong done by him. As held by the Full Bench of this Court in *William Allen v. Bai Shri Dariaba* ⁽¹⁾, upon the construction of section 32 of the Bombay Civil Courts Act, 1869, "the question" of jurisdiction "cannot be determined by the description given by the plaintiff himself of his suit. . . . This question of the Court in which the suit is to be tried must be determined from the contents of the plaint and a consideration of the position occupied by the defendant." In the present case both these requirements are fulfilled. The plaint alleges in substance that the Administrator General has wrongfully kept the plaintiffs out of possession to which they are entitled, and the position of the Administrator General is that of a public officer who in virtue of his office holds the property. We must, therefore, confirm the decree with costs.

Decree confirmed.

(1) (1890) 21 Bom. p. 771.

CRIMINAL REVISION.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, on difference of opinion between Mr. Justice Chandavarkar and Mr. Justice Aston.

EMPEROR v. BANKATRAM LACHIRAM.*

Indian Penal Code (Act XLV of 1860), section 193—Criminal Procedure Code (Act V of 1898), sections 435, 439—Perjury—Contradictory statements—Power of the High Court to interfere in revisional jurisdiction.

Where the accused was convicted and sentenced under section 193 of the Indian Penal Code (Act XLV of 1860) of giving false evidence in a judicial proceeding and where the charge was based on the allegation that in two depositions, one given on the 3rd December, 1896, and the other on the 23rd March, 1901, the accused had made two contradictory statements, and the case for the prosecution was that on that ground, though it could not be proved which of the alleged contradictory statements was false, the accused's conviction should be upheld.

Held, (by *Jenkins, C.J.*, reversing the conviction and setting aside the sentence in revisional jurisdiction,) that to convict an accused of giving false

* Criminal application for revision, No. 332 of 1903.

1904.
ANTONE
v.
ADMINISTRATOR
GENERAL
OF BOMBAY.

1904.
March 23.

1904.

EMPEROR
v.
BANKATRAM
LACHIRAM.

evidence, it is necessary to show not only that he has made a statement which is false, but that he also either knew or believed it to be false or did not believe it to be true.

Where it is sought to establish guilt solely on contradictory statements, although the Court "may believe that on the one or the other occasion the prisoner swore what was not true, it is not a necessary consequence that he committed perjury; for there are cases in which a person might very honestly and conscientiously swear to a particular fact from the best of his recollection and belief, and from other circumstances at a subsequent time be convinced that he was wrong and swear to the reverse without meaning to swear falsely either time."

Where the conviction is based on merely the statements contained in the charge without examining the whole of the depositions, the conviction is an error of law.

Where the conviction of the accused for perjury in such a case was sustained by additional evidence, namely, the statements of the brother of the accused not made on oath at the trial of the case,

Held that the statements were inadmissible and, if relied on, would vitiate the judgment.

The admission in evidence of a statement made by the accused having no real bearing on the case but showing only at the most that the accused in other matters had been untruthful, would be highly improper.

The controlling power of the High Court "is a discretionary power, and it must be exercised with regard to all the circumstances of each particular case, anxious attention being given to the said circumstances which vary greatly. This discretion ought not to be crystallized, as it would become in course of time, by one Judge attempting to prescribe definite rules with a view to bind other Judges in the exercise of the discretion which the Legislature has committed to them. This discretion, like all other judicial discretions, ought, as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case."

Per Chandavarkar, J.—In the case of perjury arising out of contradictory statements the Court dealing with them should not convict unless fully satisfied that the statements are from every point of view irreconcilable, and if the contradiction consists in two statements opposed to each other as to matters of inference or opinion on which a man may take one view at one time and a contrary view at another, there can be no perjury, unless on oath he has stated facts on which his first statement was based and then denied those facts on oath on a subsequent occasion.

Where the sole and whole question is—are the statements forming the subject of the charge so contrary that one or the other of them must be necessarily false?—the answer to that question depends upon the construction to be put upon the two depositions from which the statements are taken and their construction, as indeed the construction of any document, is a question of law not of fact.

It is not correct to say that the law as laid down in the Criminal Procedure Code (Act V of 1898) gives the High Court no power to go into evidence in revision. The Bombay High Court has, as a matter of practice, held that it will not go into evidence as a rule, but will interfere only under special circumstances, or where there is an error of law.

The accused in a criminal case is merely on the defensive and, unless there is any positive admission of a fact by him, any omission on his part to explain what indeed can be explained without his explanation should not be pressed against him.

Per Aston, J. (contra):—The rule of practice is that the High Court ordinarily refrains from opening questions of fact, when no appeal lies, except on some ground of law and in order to remedy a clear miscarriage of justice.

Where the question before the High Court exercising its powers of revision under section 439 of the Criminal Procedure Code (Act V of 1898) is one of appreciation of evidence, the rule of practice adopted is to refuse to disturb a conviction when there is legal evidence, oral or documentary, to sustain it.

"Under the law of British India, it is not necessary that the charge should allege which of two contradictory statements upon oath is false, but it is sufficient (unless indeed some satisfactory explanation of the contradiction should be established) to warrant a conviction of the offence of giving false evidence to show that an accused person has made one statement upon oath at one time and directly contradictory statement at another." It is not the duty of the Court of first instance (and far less of a Court of appeal or revision) to supply *ab extra* an explanation which the accused himself has not suggested or an intention or knowledge which the accused has not claimed.

CRIMINAL application for revision under section 439 of the Criminal Procedure Code (Act V of 1898) of an order passed by A. Lucas, Sessions Judge of Poona, confirming in appeal the conviction and sentence against the applicant (accused) passed by Ráo Bahádur Y. T. Mirikar, Special Magistrate, First Class, Ahmednagar, for perjury under section 193 of the Indian Penal Code (Act XLV of 1860).

The facts of the case were as under:—

One Ranu valad Nama Pandit was the owner of two fields, survey Nos. 19 and 21. He had mortgaged them to two Marwadi brothers, Bankatlal and Ranulal, who assigned their mortgage rights to Ramkisan valad Haribhaga Marwadi. The assignee brought a suit, No. 429 of 1835, in the Court of the Subordinate Judge of Shevgaum against the mortgagor Ranu for the recovery of the mortgage debt by sale of the mortgaged property. The defendant Ranu contended that the mortgaged

1904.

EMPEROR
v.
BAN-ATRAM
LACHIRAM.

1904.
 EMPEROR
 v.
 BANKATRAM
 LACHIRAM.

property was sold at auction for arrears of Government revenue and was purchased by one Lachiram in 1872, therefore the sons of the auction-purchaser, who had since died, should be joined as parties to the suit. On the said contention, Lachiram's sons, namely, Bankatram (accused-applicant), Shivnarayan and Dhondiram, were joined as co-defendants. They presented a joint written statement urging that they had become absolute owners of the property by reason of the auction-purchase by their father at the revenue sale. The Subordinate Judge disallowed their contention on the ground that they were not entitled to rely on the revenue sale, it being not confirmed by the Collector, and gave a decree for the plaintiff. During the trial of the said suit Bankatram (accused-applicant) was examined as a witness on the 3rd December, 1896, and he deposed as follows :—

EXHIBIT (D).
 (Translation.)

I know the parties. Lands in dispute stand in the name of Ranu. He pays assessment thereof and cultivates them. My father had paid assessment before. My father used to say that he paid the assessment. I have never cultivated the lands personally. I have hitherto taken no steps to have the lands transferred to my name. (The lands) have been let out under an oral agreement to the defendant. My father let out the lands to Ranu for cultivation about 20 or 22 years ago. I was not then present. Subsequently I let (them) to Ranu for cultivation. I receive Rs. 10 income per annum. There is no documentary proof of this with me. When Ranu paid the assessment he used to pay Rs. 10. Other people were present. * * I became divided from Dhondiram. There was no document made with respect to partition then. My brother Shivnarayan became divided about 10 years ago. On that occasion also there was no document made with respect to partition. No memos, etc., were made relating to the property. *Dhondiram lives separate from me. I have only given him a cloth-shop. No divisions (allotments of shares) have been made.* Rama Dhagya is my debtor.

Cross-examination :—*I myself am in possession of all ancestral lands and manage them.*

Subsequently in the year 1900 Dhondiram brought a suit, No. 115 of 1900, in the Court of the Subordinate Judge of Shevgaum against the said Ranu to enforce a mortgage debt by sale of the mortgaged property, namely, survey Nos. 19 and 21. The Subordinate Judge dismissed the suit by upholding the defend-

* वाटण्या झाड्या नाहीत (Vatanya zaldia nahint)

ant's contention that he had satisfied the mortgage debt by paying the *vasul* (income) in full satisfaction of the debt. In this suit also Bankatram (accused-applicant) was examined as a witness on the 23rd March, 1901, and he deposed as follows:—

EXHIBIT (E).

(Translation.)

I am plaintiff's eldest brother. We are divided. It is 13 or 14 years since we separated by effecting partition. Three garden lands and two debtors, Jahágirdár and Deshpánde, are left joint. House, etc., is not joint. I and Dhondiram became separate in Shake 1808 or 1809, and the third brother, Shivrinarayan, had separated in Shake 1807 or 1808. At that time Dhondiram might have been 12 or 13 years old. Since separation Dhondiram began to manage his estate. We were united before partition and all dealings were joint, and I used to manage (them). I knew that the survey number in suit was mortgaged to the plaintiff when the (mortgage) bond was produced in Court in suit No. 429 of 1895. In that suit I was a defendant. I and my brother have given written statement, Exhibit 20, in that suit. I did not mention the fact of the mortgage in the written statement in that suit because I was not aware of the fact of the mortgage. The land in suit was purchased by my father at an auction-sale held for default of payment of assessment and the defendant was cultivating the land on payment of rent about 2 or 3 years before we gave the written statement in 1895. The land had fallen to my share on partition. The defendant did not give me and Dhondiram wheat, gram, jowári, kardi, kadba and two bullocks by way of vasul in satisfaction of the bond. I was never summoned by the Mámlatdár on the application of the defendant and I know nothing about the application. I don't remember whether I gave my deposition or not in suit No. 429 of 1895. A copy is read out to me (but) I do not remember whether I gave my deposition or not according to it. What I have stated above, namely, that it is 12 or 13 years since Dhondiram was separated and all was partitioned out to him, is true. Only cloth-shop was given to Dhondiram (on partition). What is written in my deposition in suit No. 429 of 1895, that no partition took place, that all immoveable estate is in my possession, is not true.

Ranu valad Nama applied to the Subordinate Judge for sanction to prosecute Bankatram (accused-applicant) and his brother Dhondiram for perjury and the Subordinate Judge granted the sanction under section 193 of Indian Penal Code. Against the order of the Subordinate Judge Bankatram and Dhondiram applied to the Sessions Judge at Ahmednagar for the revocation of the sanction. The Sessions Judge confirmed the order so far as Bankatram was concerned but amended it with respect to Dhondiram by ordering his prosecution under section 209 of the

1904.

EMPEROR
v
BANKATRAM
LACHIRAM.

1904.

EMPEROR
v.
BANKATRAM
LACHIRAM-

Indian Penal Code for dishonestly making a false claim in a Court of Justice. Owing to the order of the Sessions Judge two separate trials were held by the First Class Magistrate of Shevgaum who discharged Dhondiram and framed the following charge against Bankatram :—

That you, on or about the 3rd day of December, 1896, at Shevgaum, were examined as a witness in case No. 429 of 1895, before the Subordinate Judge of Shevgaum and being bound by oath to speak the truth intentionally gave false evidence, knowing it to be false, as follows :—

"1. Dhondiram lives separate from me. I have only given him the cloth-shop. *There is no partition.*"

"All the ancestral lands are in my possession and I manage them."

2. Similarly you were examined as a witness before the said Subordinate Judge on 23rd March, 1901, in case No. 115 of 1900, and you have intentionally given false evidence, knowing it to be false, as follows :—

"I am plaintiff's elder brother" (plaintiff is Dhondiram). "We live separate. *It is 13 or 14 years back our partition took place.* Myself and Dhondiram divided in Shake 1808 or 1809; Dhondiram was aged 12 or 13 years. *Dhondiram manages his estate since partition.* It is not true what is stated in my deposition in case No. 429 of 1895, that only cloth-shop was given to Dhondiram, that no share was given to him and that all the immoveable property is in my possession."

"That the land in dispute had come to my share."

"That it is true which I have stated that Dhondiram separated before 12 or 13 years and all division of the property was made."

You have thus deliberately and falsely made two contradictory statements and that either of them is false or one is false.

Soon after the charge was framed the First Class Magistrate of Shevgaum was transferred from that place to Sangamner and the subsequent proceedings were held in the Court of the Special First Class Magistrate of Ahmednagar, who, on the 5th August, 1903, took down Bankatram's statement, which was as follows :—

Q.—Did you give your deposition (Exhibit D) which is now read out to you in the Subordinate Judge's Court?

A.—Yes, I have given that deposition.

Q.—A deposition (Exhibit E) is now read out to you. Did you give it?

A.—According to what I have heard I have given.

Q.—Will you be able to state the reason why there are discrepancies in the above two depositions?

A.—I cannot tell. (My) vakil will tell you on my behalf.

The Special First Class Magistrate of Ahmednagar, on the 31st August, 1903, found the accused Bankatram guilty of the

1904.

EMPEROR
v.
BANKATRAM
LACHIRAM.

offence charged and sentenced him to suffer rigorous imprisonment for three months and pay a fine of Rs. 300 and in default to suffer further rigorous imprisonment for one month. The Magistrate in his judgment made the following remarks:—

The suit No. 429 was brought by an assignee of a mortgagee wherein the accused, his two brothers Shivnarayan and Dhondiram and also the complainant were defendants (Exhibit O). From the evidence of the brothers of the accused (Exhibits L and M), his own admission when he was examined as a witness in a criminal case against Dhondiram (Exhibit N), his statement in Civil Suit No. 115 of 1900 (Exhibit E), and his statement as an accused before Magistrate, First Class, Mr. Joshi (Exhibit R), there can be no doubt that he deliberately made the false statement to secure his own ends probably with respect to the land in dispute. Herein the attempt seems to have been to set up a plea that there was no partition between him and his brothers and the property was joint. Looking to his statement of 1901 the plea of partition between him and his brothers is apparent and a flat contradiction of his previous statement. While under examination a copy of the statement of 1896 was read to him and he has plainly stated that it was not true.

* * * * *

From the facts and circumstances noted above there can be no doubt of the guilt of the accused. The only possible circumstance in favour of the accused in attenuating his crime is that the statements were made after a lapse of five years. The first in 1896 and the last in 1901. I am constrained to observe that offences of the kind are not uncommon in these parts through the wiliness of the money-lending class of the Marwadi to whom the accused belongs. Very few come to light unless detected in a Court of Justice or in a particular case for the gratification of a private grudge. Complainant's conduct in the case could not but attract notice. He is an illiterate and ignorant peasant and seems evidently a tool in the hands of designing persons ill-disposed to the accused. The present case seems to be one got up from spite and accused well entrapped unconscious of the dangerous net laid down for him. There is no question of the gravity of his offence. But considering the lapse of time the statements were made and looking into the circumstances of the case on the whole the accused deserves some leniency in awarding the punishment on him.

On appeal by the accused the Sessions Judge of Ahmednagar having had to deal with the application for the revocation of sanction, moved the High Court to transfer the case to some other Court. The case was accordingly transferred to the Court of the Sessions Judge of Poona, who, in confirming the conviction and sentence, observed as follows:—

It now remains for me to consider whether in the present case the two statements are so contradictory as to be irreconcilable, bearing in mind that in such cases every presumption is to be made in favour of their being reconcilable.

1904.

EMPEROR
v.
BANKATRAM
LACHIRAM.

I have carefully read the two depositions made by the accused in the two Civil suits and it is clear that in the suit of 1895 he intended it to be believed that no partition of property had taken place between himself and Dhondiram. Whereas in his statement in the suit of 1900 he intended it to be believed that a partition of property had taken place between himself and Dhondiram 12 or 13 years previously. The accused himself has not attempted to reconcile them. I therefore consider that one of these statements must be false to the accused's knowledge and that he must have made this false statement intentionally.

Against the order of the Sessions Judge the accused preferred an application for revision under section 439 of the Criminal Procedure Code. The case was heard by a Division Bench composed of Chandavarkar and Aston, JJ., who, on the 4th April, 1904, delivered the following judgments:—

CHANDAVARKAR, J.:—The petitioner before us was convicted by the Special Magistrate, First Class, of Ahmednagar, under section 193 of the Indian Penal Code of the offence of intentionally giving false evidence in a judicial proceeding by making two contradictory statements, one of which he knew to be false. The Sessions Judge of Poona, to whom the petitioner's appeal against the conviction was transferred by the orders of this Court, has confirmed the conviction. We are now asked to quash the conviction under our Revisional Jurisdiction and the first ground urged by Mr. Branson in support of the petition is that the two statements, one or the other of which has been held by the Courts below to be false, are not necessarily contradictory. I am of opinion that Mr. Branson's contention must be allowed. The statements were both made by the petitioner with reference to the question whether he was joint with or divided from his younger brother, Dhondiram. The first statement made by the petitioner was in a deposition dated the 3rd December, 1896, in suit No. 429 of 1895 of the Subordinate Judge's Court at Shevgaum and is as follows:—

"Dhondiram lives separate from me. I have only given him the cloth-shop. There is no partition. All the ancestral lands are in my possession and I manage them."

The second statement was made by the petitioner in his deposition dated the 23rd March, 1901, in suit No. 115 of 1900 of the same Court and is as follows:—

"I am plaintiff's elder brother" (plaintiff is Dhondiram).

"We live separate. • It is 13 or 14 years back our partition took place. Myself and Dhondiram divided in Shake 1808 or 1809. Dhondiram was aged 12 or 13. Dhondiram has been managing his estate since partition. It is not true what is stated in my deposition in case No. 429 of 1895 that only the cloth-shop was given to Dhondiram; that no share was given to him and that all the immoveable property is in my possession"; "that the land in dispute has come to my share." "That it is true what I have stated that Dhondiram separated before 12 or 13 years and all division of the property was made."

Now upon the statements contained in the two depositions and made the subject of the alternative charge against the petitioner the learned Sessions Judge, who heard the appeal against the conviction, says:—

"I have carefully read the two depositions made by the accused in the two Civil suits and it is clear that in the suit of 1895 he intended it to be believed that no partition of property had taken place between himself and his brother Dhondiram, whereas in his statement in the suit of 1900 he intended it to be believed that a partition of property had taken place between himself and Dhondiram 12 or 13 years previously. The accused himself has not attempted to reconcile these two statements nor is it, in my opinion, possible to reconcile them."

The contradiction then between the two depositions consists in this—that on the first occasion the petitioner stated in effect that there had been no partition between him and Dhondiram, whereas on the second occasion he stated that there had been one. But unless partition in a Hindu joint family is evidenced by a deed (and in this case the petitioner in his first deposition distinctly stated that there was no deed relating to the separation between him and Dhondiram) it has to be inferred from the acts and mutual dealings of the parties. As observed by Mr. Mayne in his Hindu Law "Numerous circumstances are set out by the Native writers as being more or less conclusive of a partition having taken place, such as separate food, dwelling or worship; separate enjoyment of the property; separate income and expenditure; business transactions with each other and the like. But all these circumstances are merely evidence, and not

1904.

EMPEROR

"

BANKATRAM
LACHIRAM.

1904.

EMPEROR

"

BANKATRAM

LACHIRAM.

conclusive evidence, of the fact of partition".⁽¹⁾ In such a case a man may well think and say as an inference of law from those acts and circumstances that there is no partition and on a subsequent occasion he may change his view as to the legal consequence of those acts and dealings and draw a contrary inference. Because he took one view of the facts on one occasion and a directly opposite view on a subsequent occasion it does not and cannot, in my opinion, necessarily follow that he has perjured himself by making contradictory statements. The statements are contradictory only so far as the man's conclusion or opinion on the facts goes. But the law does not punish a man as a perjurer because he has changed his opinion. It is often a nice question what is enough in point of law to constitute partition in a Hindu joint family and our Courts afford instances of cases where upon the same facts one Judge has held partition proved and another Judge has held otherwise. When, therefore, a witness deposing on oath states on one occasion that there was no partition and on another states that there was one, he must be presumed to be stating *not a fact* as to which there can possibly be no two views but his own impression of the legal consequences of the relations between the coparceners in a Hindu family.

So far, therefore, as the contradiction attributed by the learned Sessions Judge to the two statements of the petitioner consists in the *factum* of partition, the conviction cannot, in my opinion, stand. It is a well known rule of law applied by eminent Judges to cases of perjury arising out of contradictory statements, that the Court dealing with them should not convict unless fully satisfied that the statements are from every point of view irreconcilable, and if the contradiction consists in two statements opposed to each other as to matters of inference or opinion on which a man may take one view at one time and a contrary view at another, there can be no perjury, unless he has on oath stated *facts* on which his first statement was based and then denied those *facts* on oath on a subsequent occasion.

The question, therefore, is whether, apart from the petitioner's contradictory statements as to partition, he has stated any fact in

(1) Mayne's Hindu Law, p. 651 (6th Edn.).

1904.

EMPEROR
v.
BANKATRAM
LACHIRAM.

his first deposition, which he denied in his second deposition. I, therefore, turn to the statements of fact contained in the first deposition, so far as they were made the subject of the charge. The first statement of fact then is:—"Dhondiram lives separate from me." That statement is not denied but re-affirmed in the second deposition. The next is:—"I have only given him the cloth-shop". That no doubt appears at first as if it were denied in the second deposition, but there again it is not, as the deposition shows, a denial that the cloth-shop had been given to Dhondiram but a denial that no partition had taken place. The statement in the second deposition is:—"It is not true as stated in the deposition in suit No. 429 of 1895 that only the cloth-shop had been given to Dhondiram and that no partition had taken place." The third statement of fact in the first deposition was:—"All the ancestral lands are in my possession and I manage them." The statement in the subsequent deposition was:—"It is not true what I stated in my deposition in case No. 429 of 1895 that all the immoveable property is in my possession." I cannot understand how these two statements are necessarily contradictory. In the first deposition the witness spoke of "ancestral lands" only and stated that they were in his possession. In the second deposition, he is asked about "all the immoveable property"—a wider term than mere lands—and he says "it is not true that all the immoveable property is in my possession." The ancestral lands may be in his possession and yet at the same time he may not be in possession of all the immoveable property but only of some, *i.e.*, the lands. It is not found by the Courts below that the immoveable property consisted only of lands. Moreover the second deposition shows that the family had immoveable property besides lands. There the petitioner stated:—"Three fields and two debtors, the Jaghir-dar and the Deshpande, are joint. The house, &c., is not joint." He had stated nothing about "the house, &c." in his first deposition.

The last statement which was made the subject of the charge is contained in the second deposition. It is as follows:—"The land in dispute had come to my share."

This is said to be contradicted by the petitioner's previous

1904.

EMPEROR
v.
BANKATRAM
LACHIRAM.

statement:—"All the ancestral lands are in my possession and I manage them."

But where is the necessary contradiction between the two? In the former he is speaking of the land in dispute having fallen to his share, whereas in the latter he is speaking of that and the other lands being in his possession and management. The two statements relate to two different things—the former statement to his title, *i.e.*, to the land having fallen to his share at the partition; the latter to his possession, which is distinct from title.

But it was urged before us by the Government Pleader in support of the conviction that the petitioner himself had not attempted to reconcile the two statements, as if *his* failure to reconcile them is fatal to his case. It is the duty of the Court to see whether the statements can be reconciled or not. The accused in a criminal case is merely on the defensive and unless there is any positive admission of a fact by him, any omission on his part to explain what indeed can be explained without his explanation should not be pressed against him. When he states in his second deposition that what he stated in his first was not true, he must be taken to have substantially meant that his denial of the relation of separated coparcenery between him and his brother was not true. That, as I have observed already, bears on the question whether they were divided or not in point of law. It is a matter of opinion and as such cannot be made the basis of a conviction for perjury.

Under these circumstances, I think, we are bound to interfere in revision. The accused has been convicted by the lower Courts upon the sole fact that his statements contained in his two depositions are contradictory. As was conceded at the Bar by the learned Government Pleader before us, there is no evidence beyond the statements charged to support the conviction and none has been relied upon by the Courts below. The sole and whole question is—are the statements forming the subject of the charge so contradictory that one or the other of them must be necessarily false? The answer to that question depends upon the construction to be put upon the two depositions from which the statements are taken and their construction, as indeed the

1904.

EMPEROR
c.
BANKATRAM
LACHIRAM.

construction of any document, is a question of law, not of fact. To say that the two Courts have found upon facts is to lose sight of the common rule of law that where you have to construe a document or documents to infer a fact, the construction is one for the Judge, not for the jury; and in the present case, the evidence of perjury solely resting upon the interpretation of the accused's depositions and a correct interpretation of them showing no necessary contradiction between the two statements charged as contradictory, in my opinion, there is no legal evidence to sustain the conviction. In other words, there is no evidence to go before a jury. My conclusion that the conviction in this case must be set aside by no means involves a departure from the practice of this Court which is as a general rule not to interfere in revision with findings of fact based upon appreciation of evidence by a lower Court. It is not correct to say that the law as laid down in the Criminal Procedure Code gives us no power to go into evidence in revision. We have the power, but this Court has as a matter of practice held that it will not go into evidence as a rule, but will interfere only under special circumstances or where there is an error of law. The analogy drawn from second appeals in civil cases is beside the question when we are dealing with a criminal case in revision. But however that be, I proceed in this case upon the well recognised principle that there is an error of law where a lower Court in convicting an accused person has misread a document or documents.

For these reasons, deeming it unnecessary to consider the other point of law raised by Mr. Branson, I am of opinion that the conviction and sentence must be set aside and the accused acquitted.

ASTON, J.:—I find myself in the unfortunate position of being unable to concur.

We are asked to disturb in revision a finding of fact arrived at by the Magistrate and also by the Sessions Judge. The rule of practice which ordinarily debars us from reopening questions of fact, when no appeal lies, except on some ground of law and in order to remedy a clear miscarriage of justice has been often affirmed. See the remarks of Jardine, J., in *Queen-Empress v.*

1904.

EMPEROR
P. BAKATRAM
LACHIRAM.

Chagan ⁽¹⁾. The question whether we are to depart from that rule when no very exceptional grounds exist, and on no fixed principle, seems to me one of importance. *

If we suffer exceptions to swallow this rule we shall be granting the second appeal which the Legislature forbids; and we must entertain such "appeals by way of revision" under disadvantages so serious that it may well be doubted whether we are likely to arrive at a nearer approximation to the truth than that arrived at by the Courts below.

There exists an inevitable tendency in such second appeals to eliminate the advantage which the party on the side of truth has and to which that party is justly entitled, from the demeanour of witnesses, from the mode in which any attitude is taken up or changed, and from the local colour and unrecorded *minutiae* which give a flavour to evidence, a flavour which becomes imperceptible in second appeal. In the endeavours to remedy a particular mischief, a larger evil becomes thus introduced. The further the trial of issues of fact is removed from the real *venue* and the more desperate the situation, the greater the risk of recklessness in the instructions upon which a Court is asked to disbelieve witnesses who may happen to be truthful; and the tendency increases to treat the evidence of witnesses who happen to be in fact trustworthy as if they are unworthy of credit unless corroborated to the extent that is looked for in the testimony of criminal accomplices. The apprehension thus engendered and the discouragement caused to (already reluctant) witnesses of facts to give evidence must constitute a serious hindrance to the administration of justice.

A Court of appeal has to contend with such disadvantages, but in a lesser degree, and it does so in pursuance of a duty imposed by the law. A Court of revision which undertakes a fresh adjudication as to the facts when no appeal lies, undertakes a self-imposed task under conditions far less favourable to the elucidation of the truth than those which exist in a local tribunal. Moreover the truth being often known to a much wider circle than the parties and witnesses themselves the effect of a

(1) (1890) 14 Bom. 331 at p. 342.

mistake in estimating the truth is not confined to the mere miscarriage of justice in a particular case. The effect is more far-reaching

I will therefore state at greater length than would otherwise have been necessary my reasons for holding that the present case is not one calling for the interference of a Court of revision.

On the 3rd December, 1896, the petitioner Bankatram Lachiram Marwadi as a party witness in suit No. 429 of 1895 in the Court of the Subordinate Judge of Shevgaum said on solemn affirmation:—

“Dhondiram lives separate from me. I have only given him the cloth-shop. There is no partition. All the ancestral lands are in my possession and I manage them.”

On the 23rd March, 1901, as a witness in suit No. 115 of 1900 in the same Court he said on solemn affirmation:—

“I am plaintiff Dhondiram's elder brother. We live separate. It is 13 or 14 years back our partition took place. Myself and Dhondiram divided in Shake 1808 or 1809 (A.D. 1886 or 1887). Dhondiram was aged 12 or 13. Dhondiram manages his estate since partition. It is not true what is stated in my deposition in case No. 429 of 1895, that only cloth-shop was given to Dhondiram, that no share was given to him and that all the immoveable property is in my possession. That the land in dispute had come to my share. That it is true which I have stated that Dhondiram separated before 12 or 13 years and all division of the property was made.”

The First Class Magistrate Mr. Mirikar, who tried the case, convicted the petitioner under an alternative charge, in which the above statements are set out, being convinced, on the evidence adduced, that in one or the other of the said two judicial proceedings the petitioner had intentionally given false evidence by making a false statement which he knew to be false.

In coming to that conclusion the Magistrate based his decision upon the evidence summarized in his judgment. It will be observed that this evidence is not confined to any apparent irreconcilability between the evidence given by the petitioner on the two occasions.

The evidence included the further statements of the petitioner himself when full opportunity was afforded to him to

1904.

EMPEROR

v.

BANKATRAM
LACHIRAM.

1904.

EMPEROR
v.
BANKATRAM
LACHIRAM.

reconcile his contradictory depositions. The Magistrate took into consideration the circumstances under which petitioner gave his evidence in each of the two civil suits as the Magistrate was entitled to do, for as remarked in *Edgington v. Fitzmaurice*⁽¹⁾ cited quite recently in a decision of this Court, the history of a case is to be looked to in testing the truth or falsity or animus of a statement.

Moreover the petitioner's pleader had at the trial strongly urged that the proviso to section 132 of the Evidence Act (I of 1872) applies to the facts and circumstances of the case, a contention which is wholly irrelevant if the petitioner did not incriminate himself by the answers he gave in his deposition in the latter suit.

The Sessions Judge came to the conclusion that it is clear that by his statements in the earlier suit the petitioner intended it to be believed that no partition of property had taken place between himself and his brother Dhondiram, whereas in his statement in the later suit he intended it to be believed that a partition had taken place 13 or 14 years previously.

So viewing the general purport of the statements of petitioner on the two occasions he points out that the accused has not attempted to reconcile them and considers it is not possible to reconcile them. It may be presumed that the Sessions Judge meant irreconcilable *as they stand*, because it is difficult to conceive how any two contradictory statements can possibly be irreconcilable if the same words used in each are treated as used in a different sense in each statement. The Sessions Judge goes on to say, "I therefore consider that one of these statements must be false to the accused's knowledge *and that he must have made the false statement intentionally.*"

That is clearly a finding of fact. Even if that finding had been based upon the contradiction between the depositions of the accused no question of construction of documents would arise, for the depositions are merely the judicial proof of the oral evidence given by the petitioner in the two judicial proceedings referred to in the charge. But, as already pointed out, that finding of fact that the petitioner in one or other of the said two

(1) (1865) 29 Ch. D. 459.

civil suits intentionally gave false evidence is based not only on the *prima facie* contradiction in portions of petitioner's depositions set out in the charge, but also upon other evidence recorded. Whether that finding of fact is supported by the evidence is a matter of appreciation of evidence.

"It is only in very exceptional cases that this Court sitting as a Court of Revision deals with questions of evidence, and disturbs or supplements the finding of a lower Court on a question of fact—*Queen-Empress v. Shekh Sahab Badrudin*⁽¹⁾. It will do so, in the interests of justice, where the inquiry in the lower Court has been faulty—*Nobin Krishna v. Rassick Iall*⁽²⁾." See *Bhawoo Jivaji v. Mulji Dayal*⁽³⁾.

"Section 439 of the Criminal Procedure Code provides that the High Court in revision may (subject to certain limitations not necessary now to be dwelt upon) in its discretion exercise any of the powers conferred on a Court of appeal. The interference of the High Court in revision is not therefore limited to matters of law; but it is fully competent to this Court to enter into matters of fact if it thinks fit. On the other hand it is not bound to go into evidence if it does not think fit, and the question is where should it exercise this discretionary power and where not. Clearly the mere application of a party to examine the evidence in any case would not be a sufficient ground for doing so. Section 440, which makes it optional with the Court in revision to hear parties or their pleaders, renders this quite clear. Indeed, were it otherwise, there would virtually be a second appeal on facts in every case in which the parties came up to this Court. This we do not think the Legislature could have intended. There must appear upon the face of the judgment or order complained of or of the record some ground (which need not always be a ground of law) to induce this Court to think that the evidence ought to be examined in order to see that there has been no failure of justice. Where there is no such ground, the practice has been to limit the interference in revision to matters of law," *Keshab Chunder Roy v. Akhil Metey*⁽⁴⁾ where the

1904.

EMPEROR
v.
BANKATRAM
LACHIRAM.

(1) 1883) 8 Bom. 197.

(3) (1888) 12 Bom. 377 at p. 390.

(2) (1884) 10 Cal. 1017.

(4) (1895) 22 Cal. 998 at p. 1001.

1904.

EMPEROR
v.
BANKATRAM
LACHIRAM.

cases of *Nobin Krishna Mookerjee v. Russick Lall Laha*⁽¹⁾; *Reid v. Richardson*⁽²⁾; *Queen-Empress v. Shekh Sahab Badrudin*⁽³⁾; *Bhawoo Jivaji v. Mulji Dayal*⁽⁴⁾ and *Queen-Empress v. Chagan Dayaram*⁽⁵⁾ are cited as authorities for the above view of the law and practice.

The actual words used in section 439 of the Criminal Procedure Code (V of 1898) are "the High Court may in its discretion exercise any of the powers conferred on a Court of appeal by sections 195, 423, 426, 427 and 428 or on a Court by section 338." In none of these cited sections is any power conferred to re-open findings of fact, but it may be inferred that the powers actually conferred by these sections are to be exercised in accordance with, and subject to, the other provisions of the Code. It is section 418 which enacts that "An appeal may lie on a matter of fact as well as a matter of law, except where the trial was by jury, in which case the appeal shall lie on a matter of law only," thus by implication conferring on an Appellate Court a power to re-open findings of fact. One of the questions which arises in construing section 439 of the Code is whether a concurrent finding of fact by two different Courts stands on a lower footing than a finding in a trial by jury and whether the Legislature could have intended that such a concurrent finding, where there is evidence to sustain it, should be disturbed by a Court of revision. For it has always been conceded that the revisional jurisdiction conferred by section 439 of the Code is to be exercised with due regard to the other provisions of the Code which forbid a second appeal.

The limits within which this Court will exercise its discretion as to disturbing a finding of fact on mere appreciation of evidence were long ago pointed out. In *Queen-Empress v. Shekh Sahab Badrudin*⁽⁶⁾ *Kemball, J.*, remarked in the course of the argument: "Our rule is that in cases in which there is no appeal we do not weigh the evidence or disturb the Magistrate's finding. If we did so, we should be giving the appeal forbidden by law. Under the old Code we did not deny that

(1) (1884) 10 Cal. 1047.

(2) (1887) 14 Cal. 361.

(3) (1883) 8 Bom. 197.

(4) (1888) 12 Bom. 377.

(5) (1890) 14 Bom. 331.

(6) (1888) 8 Bom. 197 at p. 198.

1901.

EMPEROR

v.

BANKATRAM
LACHIRAM.

we had the power of going into the evidence, but we invariably refused to exercise it, save upon a question of law, *e.g.*, that there was no evidence whatever to sustain a conviction"; and the judgment in that case says:—"The question with which we are now concerned, is whether the circumstances brought to our notice in the present case are such that we ought, in the exercise of our discretion, to reverse the convictions of the two accused on the ground that the evidence does not support them. Hitherto we have refused, and we shall continue to refuse, save on very exceptional grounds, to exercise that discretion."

Where the question before this Court exercising its powers of revision under section 439 of the Criminal Procedure Code is one of appreciation of evidence, the rule of practice adopted, so far as I gather from the decisions and from such experience as I have obtained on this Bench, is to refuse to disturb a conviction when there is legal evidence, oral or documentary, to sustain it: and I understood Mr. Branson's arguments to be directed to show that there was some error in law in the trial and that the conviction was for one reason or another illegal.

It was contended that even though a person may have clearly given false evidence intentionally in one or other of two depositions made by him, he cannot, under the provisions of the Criminal Procedure Code, be successfully prosecuted unless it can be established in the affirmative on which of the two occasions his evidence was false.

The case of *Queen-Empress v. Mugapa*⁽¹⁾ decided by a Full Bench (without any argument at the Bar) was cited as authority to show that in such circumstances an alternative charge cannot be framed. This use of the ruling in that case invites two observations. First, it was intended to apply where there is no other evidence but the contradictory statements. Secondly, that decision was passed before the Code was amended by Act V of 1898 and dealt with the contradiction between statements made to a Police officer making an investigation under section 161 and statements made in a Court of justice.

Under the Criminal Procedure Code then in force a witness examined orally by a Police officer was bound to answer *truly*

⁽¹⁾ (1893) 18 Bom. 377.

1904.

EMPEROR
v.
BANKATRAM
LACHIRAM.

and being thus bound by an express provision of law to state the truth (section 191, Indian Penal Code) prosecutions became common for giving false evidence when a witness contradicted in Court a statement he had made to the Police.

Such prosecutions came deservedly into disrepute because they were calculated to deter persons who had designedly or carelessly made incorrect statements to the Police from speaking the truth in Court. The ruling in *Queen-Empress v. Mugapa*⁽¹⁾ dealt with such a prosecution. The law has since been altered, the word "truly" is now omitted in section 161, Criminal Procedure Code, and the following illustration is added to section 236 :—

"(b) A states on oath before the Magistrate that he saw B hit C with a club. Before the Sessions Court A states on oath that B never hit C. A may be charged in the alternative and convicted of intentionally giving false evidence, although it cannot be proved which of these contradictory statements was false."

Mr. Branson contended that this is an "inapt" illustration and does not alter the effect of the section 236 which, according to his argument, does not authorise an alternative charge in such a case. But if this is so, the Legislature would presumably have amended section 236 itself instead of merely adding the illustration quoted.

Section 236 is as follows :—"If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences."

It was argued that the "series of acts" here contemplated must be a series of connected acts. The section does not say so: and a series of acts may be a series of disconnected acts or series of connected acts. Then it was said that "several offences" means offences not of the same kind.

We are dealing not with section 72 of Indian Penal Code, where the "several offences" to be specified in an alternative judgment may well mean offences not of the same kind, but with the

(1) (1893) 18 Bom. 377.

provision of the Criminal Procedure Code as to joinder of charges.

Even the "*distinct*" offences contemplated in section 233 of the Criminal Procedure Code may be offences of the same kind as may be seen by reference to section 234, for it is only when three distinct offences are of the same kind and committed within the space of twelve months, that they can be charged and tried at the same trial except in the cases covered by sections 235, 236, 239.

A finding that A has committed murder by administering poison to B, or stabbing him, or by drowning him, is not an alternative judgment under section 72 of the Indian Penal Code, but a judgment that A has committed one offence of murder by one or other of the said three different acts.

So a finding that A has committed the offence of intentionally giving false evidence in one or other of two depositions absolutely contradictory and unexplained is not an alternative judgment under section 72 of the Penal Code, though if a separate charge were framed in respect of each of the two depositions, there would be several offences charged within the view of the Criminal Procedure Code and the judgment might then be alternative within the view of the Criminal Procedure Code. Whether the prosecution elected to proceed upon one charge framed alternatively or upon two separate charges would be a matter of form as long as section 236 remains in the Code, but if that section be eliminated the remaining sections as to joinder of charges would create difficulties especially if there happen to be an interval of more than a year between the two depositions.

The addition of illustration (b) to section 236 of the Act V of 1898 seems to show that in the view of the Legislature section 236 removes those difficulties, a view in accord with the Full Bench decision of the Calcutta High Court as far back as 1874 in *Queen v. Mahomed Hoomayoon Shaw*⁽¹⁾.

A conviction is therefore in my opinion legal on an alternative charge of an offence under section 193 of the Indian Penal Code.

Then it was argued that the statements set out in the charge from the two depositions are not absolutely irreconcilable and therefore the conviction is bad in law.

1904.

EMPEROR
v.
BANKATRAM
LACHIRAM.

(1) (1874) 13 Beng. L. R. 324.

1904.

EMPEROR
v.
BANKATRAM
LACHIRAM.

That argument I understand to be based upon the decisions in *Queen v. Bidu Noshyo*⁽¹⁾ and *Queen-Empress v. Ramji*⁽²⁾, and more especially upon a remark of Duthoit, J., in *Queen-Empress v. Ghulet*⁽³⁾: "Every possible presumption in favour of a reconciliation of the two statements should be made, and it must be found that they are absolutely irreconcilable before a conviction can be had upon the ground that one of them is necessarily false." That remark occurs in an exhaustive Judgment in which Duthoit, J., sets out the grounds for his opinion that "under the law of British India, it is not necessary that the charge should allege which of two contradictory statements upon oath is false, but it is sufficient (unless, indeed, some satisfactory explanation of the contradiction should be established) to warrant a conviction of the offence of giving false evidence to show that an accused person has made one statement upon oath at one time, and a directly contrary statement at another."⁽⁴⁾

That being the view of the law of British India which that elaborate Judgment upholds, a view which the Legislature as already shown has sought to affirm by adding the new ill. (b) to section 236 of the Criminal Procedure Code (Act V of 1898), it must be obvious that when Duthoit, J., said "every possible presumption in favour of a reconciliation between the two statements should be made," he did not mean to imply that it is any part of the duty of a Court of first instance (and far less of a Court of appeal or revision) to supply, *ab extra*, an explanation which the accused himself has not suggested, or an intention or knowledge which the accused has not claimed.

Section 106 of the Evidence Act (I of 1872) enacts that "when any fact is specially within the knowledge of any person the burden of proving that fact is upon him," and ill. (a) to that section runs: "when a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him."

To make my meaning plain I may refer to the ordinary rule in section 114, Evidence Act, ill. (a), that "a Court may presume

(1) (1869) 13 Beng. L. R. 325 (f. n.).

(2) (1885) 10 Bom. 124.

(3) (1884) 7 All. 44, p. 63.

(4) (1884) *Ibid.* p. 46.

that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen unless he can account for his possession."

But if an accused person in such circumstances were to offer no explanation and say he had none to offer, and a Magistrate were to convict him it would surely be, to quote words used by Sir Barnes Peacock in *Queen v. Mussamut Zumeerun*,⁽¹⁾ "trifling with the administration of justice" for an appellate or a revisional Court to reverse the conviction because the Magistrate had not taken into consideration some explanation not suggested by the accused but within the bounds of possibility, such as that the accused may have been hypnotised and the stolen property surreptitiously introduced into his pocket.

What the Court has to consider is the evidence and any explanation the accused may offer, not every possible explanation which ingenuity may imagine after the trial is over.

So in a trial for perjury when the course is adopted of framing a charge containing contradictory statements of such a nature that they, when taken in combination, disclose according to the prosecution the specific offence of intentionally giving false evidence, "it must be matter of evidence whether the contradictory statements contained in the charge are *per se* so irreconcilable that one of them is necessarily false, and also that the prisoner in making them intentionally spoke falsely in regard to one of them. This it is the province of the jury or Court to determine"—per Morris, J., in *Queen v. Mahomed Hoomayoon Shaw*.⁽²⁾

At such a trial it is of the utmost importance that "the accused should have every possible opportunity of explaining the statements in question, and of showing that the alleged contradiction does not really exist"—per Strachey, C.J., in *Queen-Empress v. Puran*⁽³⁾—and any evidence as to intention or knowledge and any explanation offered will form part of the evidence to be weighed and appreciated by the Court which tries the case and, where an appeal lies, by the appellate Court.

(1) (1866) 6 W. R. 65 at p. 68 (Cri. Rul.). (2) (1874) 13 Beng. L. R., p. 335.

(3) (1899) All. W. N. 39 at p. 40.

1904.

EMPEROR

BANKATRAM
LACHIRAM.

1904.

EMPEROR
v.
BANKATEAM
LACHIRAM.

In *Queen-Empress v. Ramji*⁽¹⁾ Wedderburn, J., cited *Queen v. Bidu Noshyo*⁽²⁾ as laying down the principle that "in charges founded upon supposed contradictory statements every presumption in favour of the possible reconciliation of the statements must be made." But in that Bombay case the Court was dealing with the question whether the impugned statements taken as they stood, in their ordinary meaning, were absolutely contradictory and it came to the conclusion that so viewed they were not contradictory.

In *Queen v. Bidu Noshyo*⁽²⁾ the Court was dealing with supposed contradictory statements without explanation or evidence, *ab extra*, to show that the words used were used in other than their ordinary sense, or that there was no such intention or knowledge as the law requires. The statements were therefore examined as they stood to see whether as they stood they were so absolutely contradictory that it was impossible that both should be true; and it was in regard to such an examination that Markby, J., observed: "it is of course plain that before a prisoner can be convicted of perjury on the ground that he has made two contradictory statements without ascertaining which of the two is true, and which is false, every presumption in favour of the possible reconciliation of the statements must be made."

Remembering the sort of prosecution for which the above principle was laid down and bearing also in mind that it follows from the very definition of the offence of giving false evidence (sections 191, 193 of the Indian Penal Code) that even where the statements charged are *per se* irreconcilable or absolutely contradictory, the accused cannot be convicted if he can satisfy the Court by evidence or credible explanation that neither statement was false to his knowledge or intentionally false, the only question which now remains is whether there is evidence on the record to sustain the concurrent finding of fact of both the lower Courts that in one or the other of the depositions quoted in the charge the accused intentionally gave false evidence. That in fact is the true issue. Looking to the evidence before the Court of first instance already discussed in

(1) (1885) 10 Bom. 124 at p. 130.

(2) (1869) 13 Beng. L. R., p. 330 (*f. n.*).

the Magistrate's Judgment it is impossible to say that this issue was decided merely upon the contradiction between the impugned statements, or to say that there is not evidence to sustain the Magistrate's finding.

That being so and the question before us being really one of appreciation of evidence, it would be in accordance with the practice of this Court, as I understand it, to refuse to interfere as a Court of revision, and I would accordingly decline to interfere.

But if we are to go into the evidence, then I would say that upon the evidence in this case there is in my opinion no room for reasonable doubt that the petitioner did in one or the other of the depositions quoted in the charge intentionally give false evidence.

I do not attach importance to the fact that the term "all the ancestral lands" in one deposition is changed to "all the immoveable property" in the other, the accused did not himself give any significance to this, when reiterated opportunities for explanation were given. In 1895 he says explicitly: "there is no partition;" in 1901 he says: "it is 13 or 14 years back our partition took place; myself and Dhondiram divided in Shake 1808." In 1895 he says explicitly: "I have only given him (Dhondiram) the cloth-shop;" in 1901 he says equally explicitly: "it is not true what is stated in my deposition in case No. 429 of 1895 that only cloth-shop was given to Dhondiram"; and further: "Dhondiram separated before 12 or 13 years and all division of property was made."

Confronted in 1901 with this contradiction he does not suggest that he was using the same words in different senses, or attempt to explain; on the contrary he says plainly that his earlier evidence was untrue.

There are the depositions themselves which by their tenor show with what intent the impugned statements were made on each occasion. When further opportunities are given, in the course of the criminal prosecution, for explanation, he twice reiterates (15th May and 5th August, 1903) that he has no explanation himself to offer.

It is unnecessary therefore to pursue further the evidence discussed in the Judgment of the Magistrate.

1904.

EMPEROR
V.
BANKATRAM
LACHIRAM.

1904.

EMPEROR

v.

BANKATRAM
LACHIRAM.

The Judges having thus differed, the case was referred to Jenkins, C.J., under section 429 of the Criminal Procedure Code.

Branson with Gangaram B. Rele for the applicant (accused) :—
Wrong construction has been put upon the depositions of the accused. Even in his first deposition he says that he was divided from his brother Dhondiram. There was no division by metes and bounds. The three brothers divided the property according to their convenience. Further, the whole of the property was not divided because the accused distinctly says in his second deposition that two debtors and some property, which could not be partitioned, were kept intact. It was very hard upon the accused to ignore the fact that a long time had elapsed between the two depositions and that during the interval circumstances might have occurred which brought about a change in his opinion as to the state of things at two different times.

The second deposition does not, as is apparent from the way it has been recorded, represent the real state of affairs. In that deposition the accused is referred to his first deposition and is made to say something which he never said in his first deposition. There is no warrant in law to support such a course.

Great stress has been laid upon the inability of the accused to explain away the alleged inconsistencies in his depositions. But there is an explanation in the depositions themselves. If the two depositions be read together as a whole the apparent discrepancies vanish away. Our case has been prejudiced by selecting stray passages from the two depositions and comparing them together for making out the discrepancies. If there are apparent discrepancies, it is the duty of the Court to see whether there is anything in the case which can explain them. An accused person cannot be convicted simply on the ground that he is not able to explain the contradictions in his depositions. He can be convicted only if the discrepancies are in no way reconcilable.

Admitting for the sake of argument that the two depositions contain contradictory statements, still we contend that there was no necessity in the earlier suit to put questions with respect to partition. The questions were utterly irrelevant to the pleadings. Therefore it was not necessary to institute a comparison between

the two depositions, Starling's Criminal Law, p. 242. Thus if the first deposition be eliminated, the second deposition stands by itself alone, and then there would be nothing on the record to show that it is false.

Further, to support the conviction of the accused some other evidence is brought on the record. But that evidence was inadmissible and it was highly irregular to refer to it. The evidence consists of two statements made by Dhondiram and Shivnarayan, the brothers of the accused, in the trial against Dhondiram. There are two other Exhibits, one of them is a statement made by the accused which is in no way material to the present inquiry and the other is the joint written statement filed by the accused and his brothers in suit No. 429 of 1895. It is impossible to understand the object with which the written statement was brought on the record of this trial. The members of a family may be divided still there is nothing to prevent them from filing a joint written statement.

The Special First Class Magistrate who tried the case has observed in his judgment that the accused has been entrapped and that the complainant is not the real prosecutor but there are some other persons behind the scene.

Our next contention is that the alternative charge cannot be sustained. Section 236 of the Criminal Procedure Code contemplates offences arising out of a single act or a series of acts. In the present case the two depositions were not given in the same suit and were not given at times which governed a series of acts. They were given in two different suits, which were brought by different parties, with respect to different causes of action. Section 236 is, therefore, not applicable and the illustration to that section is not in accord with it. Our contention is fortified by the ruling of the Full Bench of this Court in *Queen-Empress v. Mugapa*.⁽¹⁾

Rao Bahádur V. J. Kirtikar (Government Pleader), for the Crown :—The statements embodied in the charge clearly show that they are discrepant, and there is no explanation offered by

1904.

EMPEROR
v.
BANKATRAM
LACHIRAM.

(1) (1893) 18 Bom. 377.

1904.

EMPEROR

v.

BANKATRAM
LACHIRAM.

the accused with respect to them though he was called upon by the Magistrate to do so.

[JENKINS, C.J.:—If there are discrepancies they are merely apparent and the depositions, when read together, clearly explain them away. Even in his first deposition the accused says that he was divided from his brother Dhondiram.]

The Magistrate has relied upon some other evidence to support the conviction. There are his own statements which incriminate him. They clearly show that he is not a man who tells the truth. The ruling in *Queen-Empress v. Mugapa*⁽¹⁾ was relied on but it is not applicable because one of the statements therein was made before a police officer.

[JENKINS, C.J.:—That is a ruling of the Full Bench of this Court and I am bound by it.]

JENKINS, C.J.:—The accused, Bankatram Lachiram, having been convicted under section 193 of the Indian Penal Code of giving false evidence in a judicial proceeding, and sentenced to imprisonment and a fine, has applied to this Court in revision. In consequence, however, of a division in opinion on the part of the Judges composing the Bench, before whom the application was heard, the case has been laid before me as provided by section 439 of the Criminal Procedure Code.

The charge is based on the allegation that in two depositions, one given on the 3rd of December, 1896, the other on the 23rd of March, 1901, the accused has made contradictory statements, and the case of the prosecution is that, on that ground, though it cannot be proved which of these alleged contradictory statements was false, the accused's conviction should be upheld.

To convict an accused of giving false evidence it is necessary to show not only that he has made a statement which is false, but also that he either knew or believed it to be false or did not believe it to be true.

It has been said by very high authority, and the remark has manifest application to a case where, as in the present, it is sought to establish guilt solely on contradictory statements, that

⁽¹⁾ (1893) 18 Bom. 377.

"although you may believe that on the one or the other occasion the prisoner swore what was not true, it is not a necessary consequence that he committed perjury; for there are cases in which a person might very honestly and conscientiously swear to a particular fact from the best of his recollection and belief; and from other circumstances at a subsequent time, be convinced that he was wrong, and swear to the reverse, without meaning to swear falsely either time."⁽¹⁾

It is clear therefore that one must approach a case resting merely on supposed contradictions with the greatest caution, and more particularly where, as here, a number of years intervene between the two statements. In this case there is an additional occasion for caution in the motive and origin of this prosecution as described by the Magistrate, who says "complainant's conduct in the case could not but attract notice. He is an illiterate and ignorant peasant and seems evidently a tool in the hands of designing persons ill-disposed to the accused. The present case seems to be one got up from spite and accused well entrapped, unconscious of the dangerous net laid out for him".

The accused, it is said, belongs to the Marwadi class; but whatever he may be, he is entitled to demand that he shall only be convicted of an offence under the Penal Code on legal evidence. What then are the proofs on which his conviction rests?

The two statements are set out in the charge in the following terms:—

First statement.—"Dhondiram lives separate from me. I have only given him the cloth-shop. There is no partition. All the ancestral lands are in my possession and I manage them."

Second statement.—"I am plaintiff's elder brother" (plaintiff is Dhondiram). "We live separate. It is 13 or 14 years back our partition took place. Myself and Dhondiram divided in Shake 1808 or 1809. Dhondiram was aged 12 or 13. Dhondiram manages his estate since partition. It is not true what is stated in my deposition in case No. 429 of 1895 that only the cloth-shop was given to Dhondiram; that no share was given to him and that all the immovable property is in my possession; that the land in dispute has come to my share." "That it is true what I have stated that Dhondiram separated before 12 or 13 years and all division of the property was made."

(1) Per Holroyd, J., in *R. v. Jackson* (1823) 1 Lewin C. C. 270.

1904.

EMPEROR
v.
BANKATRAM
LACHIRAM.

1904.

EMPEROR
v.
BANKATRAM
LACHIRAM.

In the opinion of both the lower Courts these statements were so contradictory as to be incapable of reasonable reconciliation.

It is common ground that in the second statement the accused made out that there had been a partition between him and his brother Dhondiram. Turning then to the first statement as set forth in the charge, we find the following words placed in the accused's mouth: "there is no partition." Here then, says the prosecution, is an irreconcilable contradiction, here are the undoubted proofs of guilt.

But to judge of the true meaning of any single phrase it is necessary to see what the accused said in the rest of his deposition; for perhaps there may be found that which will throw a fresh light on the words which form the subject of the charge. Yet I cannot find in the judgment of either of the lower Courts any trace of such an investigation: I say this because I fail to see how the rest of the depositions could have been read without its at once becoming apparent that an erroneous construction had been placed on the accused's testimony in the earlier deposition.

Now going back but a few sentences earlier in the first statement than those on which the prosecution rely I find this is what the accused said on that occasion:

"I became divided from Dhondiram. There was no document made with respect to partition then. My brother Shivnarayan became divided about ten years ago. On that occasion also there was no document made with respect to partition. No memos, &c., were made relating to the property. Dhondiram lives separate from me. I have only given him a cloth-shop. No divisions (*i.e.*, allotments of shares) have been made. Rama Dhagya is my debtor.

Cross-examination: I myself am in possession of all ancestral lands and manage them."

This translation is approved on both sides and contains the so-called incriminating passage.

This then is the deposition from which, according to the Sessions Judge, it is evident that the accused "intended it to be believed that no partition of property had taken place between himself and his brother Dhondiram."

So far from the deposition evincing the intention imputed to it, in my opinion it points emphatically the other way: there is

a distinct assertion of division from Dhondiram and of division from Shivnarayan, followed by the statement that Dhondiram lives separate from him. Here is the clearest statement of a partition. While the statement ascribed to the accused, "There is no partition," manifestly does not bear the meaning that has been placed on it: the proper rendering is "No divisions (*i.e.*, allotments of shares) have been made," and I say this not only because that has the approval of the Court interpreter, but also because it is obviously demanded by the context.

The meaning of the passage taken as a whole is obvious; it is that there has been a division, that is a partition, though there is no document evidencing it, and no partition by metes and bounds has been effected. Whether this statement is true or false is not shown, and in the circumstances is immaterial: the point to be kept in mind is that the conviction of the accused proceeds wholly upon the assumption that there is in this deposition a negation of partition, which is contradictory of the assertion of partition contained in the second deposition. I have shown that there is no warrant for the assumption, and with it the justification of the conviction so far as it rests on it completely disappears. The Magistrate seems to have seen a contradiction between the statements "All the ancestral lands are in my possession and I manage them" on the one hand and what the accused has stated in his second deposition on the other. It therefore becomes necessary to examine the second deposition, and when that is done it will be seen that there are omitted from the charge portions of the deposition which materially affect those included in it. Thus we have this sentence "It is 13 or 14 years back our partition took place": this might be taken to indicate a complete partition by metes and bounds, but the next sentence, which is omitted from the charge, shows this is not so, for there it is said "Three garden lands and two debtors, Jahagirdar and Deshpande, are left joint," showing that there was not a complete partition.

Then I feel bound to refer to another portion of the deposition for the purpose of showing the unsatisfactory materials on which the conviction is based. It runs as follows:—"What is stated above, *viz.*, that it is 12 or 13 years since Dhondiram was

1904.

EMPEROR

v.
BANKATRAM
LACHIRAM.

1904.

EMPEROR
v.
BANKATRAM
LACHIRAM.

separated and all was partitioned out to him is true": now the accused never had said this; he had made the statement to which I have already referred as pointing to an incomplete partition; yet this is a part of that on which the conviction was based. The deposition then proceeds as follows:—"Only the cloth-shop was given to Dhondiram (on partition). What is written in my deposition in suit No. 429 of 1895, that no partition took place, that all immoveable estate is in my possession is not true."

But here again the accused had never said in his earlier deposition what is here ascribed to him; I have already pointed out that so far from alleging that no partition took place, he distinctly says that he became divided both from Dhondiram and from Shivanarayan: similarly he never said in the first deposition "All immovable estate is in my possession": what he did say is "I myself am in possession of all ancestral lands and manage them". I notice that in one of the judgments it is said that no importance is attached to this: I cannot understand this: it appears to me completely to overlook the fact that besides the lands there was a house and also that in the first deposition the cloth-shop was stated to have been given to Dhondiram, so that while it might have been true that the ancestral lands were in the accused's possession, it would not have been true to say that all the immovable property was in his possession; and thus there is an obvious and most material distinction between the two statements. That this was a distinction present to the accused's mind is apparent from the second deposition where he says, "Three garden lands . . . are left joint. House, &c., is not joint." Here we find a clear distinction drawn between the lands on the one hand and the house on the other, though they both were immovable property. It will be apparent from what I have here said that the second deposition was either recorded with great carelessness, or the examination of which it purports to be a record was conducted on lines that never should have been permitted, in that it ascribed to the witness prior statements he had not made. A more unsatisfactory foundation for a charge of giving false evidence there could not be; but apart from this I am clear there

are no such contradictions as can form the legal basis of a conviction.

Had the whole of the depositions been examined with care and not merely the statements contained in the charge, I cannot believe that the lower Courts would have come to the conclusion they did, and I have not the slightest hesitation in holding that a conviction on these materials was an error of law.

In the opinion however of one of the learned Judges from whom this reference is made this Court should decline to interfere, and in arriving at this view he has said "Looking to the evidence before the Court of First Instance already discussed in the Magistrate's judgment, it is impossible to say that this issue was decided merely upon the contradiction between the impugned statements, or to say that there is not evidence to sustain the Magistrate's finding". Now this additional evidence consists of Exhibits L, M, N and O. But it is clear that so far as the Magistrate rested his decision on the two first of these Exhibits he committed an error of law: they were, I am told, statements by the accused's brothers, not made on oath in this case, and therefore obviously inadmissible. If, therefore, the Magistrate relied on them, that of itself would vitiate his judgment.

The other two Exhibits were made by the accused, but the prosecution, when challenged, could not suggest that they had any real bearing on the case and at most would only show that the accused in other matters had been untruthful. It requires no citation of authority to show that their admission for such a purpose would be highly improper. The result therefore is this that so far as the Magistrate did not rely merely upon the contradiction he committed an additional error.

But the suggestion that this Court should not interfere calls for further notice, as it rests on a train of reasoning which I cannot pass without remark, though I conceive it to be inapplicable to the circumstances of this case.

The powers of the High Court are defined by the Code of Criminal Procedure: and it is there that we must go to learn what its powers are. Section 435 empowers the High Court to call for and examine the record of any proceeding before any

1904.

EMPEROR
v.
BANKATRAM
LACHIRAM.

1904.

EMPEROR
v.
BANKATRAM
LAOHITRAM.

Criminal Court situate within the local limits of its jurisdiction for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court.

Then by Section 439 it is provided that in the case of any proceeding the record of which has been called for by itself or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of appeal by sections 195, 423, 426, 427 and 428 or on a Court by section 338.

The Legislature could not have expressed itself with greater clearness, but it has been suggested that the Courts have imposed on the plain terms of these sections a gloss which narrows the scope of the discretion vested in the High Courts.

If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion, and whenever it is argued that judicial decision has deprived us of the power that the Legislature has given us I recall the words of an eminent English Judge. "I desire to repeat," he said, "what I have said before, that this controlling power of the Court is a discretionary power, and it must be exercised with regard to all the circumstances of each particular case, anxious attention being given to the said circumstances, which vary greatly. For myself I say emphatically that this discretion ought not to be crystallized as it would become in course of time by one Judge attempting to prescribe definite rules with a view to bind other Judges in the exercise of the discretion, which the Legislature has committed to them. This discretion, like all other judicial discretions, ought as far as practicable to be left untrammelled and free so as to be fairly exercised according to the exigencies of each case."

These weighty words appear to me to breathe the spirit that should guide us in the exercise of our discretionary powers of revision. This may perhaps increase our responsibilities and add to our labours, but no one would shirk the one or grudge the other.

The exigencies of the case now in hand emphatically call for the interference of this Court, and my opinion is that the conviction and the sentence should be set aside and the accused acquitted, and the fine (if paid) refunded.

Though at one time I thought otherwise, on further reflection I think the decision of the Full Bench of this Court consisting of Sir Charles Sargent, C.J., and Telang, Candy and Fulton, JJ., in *Queen-Empress v. Mugapa* ⁽¹⁾ does not cover this case.

(1) (1893) 18 Bom. 377.

1904.

EMPEROR
v.
BANKATRAM
LACHIRAM.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Bathy.

KUNJ BIHARI PRASADJI PURSHOTTAM PRASADJI (ORIGINAL PLAINTIFF), APPELLANT, v. KESHAVLAL HIRALAL AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS. *

1904.

March 30.

Specific Relief Act (I of 1877), section 42—Declaratory Suit—Declaration—Further Relief—Court—Jurisdiction.

Section 42 of the Specific Relief Act enacts that no Court shall make a declaration in a suit in which the plaintiff being able to seek further relief omits to do so. The section does not empower the Court to dismiss such a suit.

An injunction is a "further relief" within the meaning of section 42 of the Specific Relief Act.

Farasram v. Bhimbhai ⁽¹⁾ followed.

SECOND appeal from the decision of Mr. S. L. Batchelor, District Judge of Ahmedabad, confirming the decree passed by Chandulal Mathuradas, First Class Subordinate Judge of Ahmedabad.

Suit for declaration and injunction.

One Purshottam Prasadji, who was the last owner or *gadipati* of the Swaminarayan's temple at Ahmedabad, died on the 10th December, 1901. Previously to his death Purshottam Prasadji made a will on the 21st April, 1901, whereby he adopted defendant No. 14 as his adopted son, and appointed defendants

* Second Appeal 593 of 1903.

(1) (1903) 5 Bom. L. R. 195.

1904.

KUNJ BIHARI
v.
KESHAVLAL
HIRALAL.

Nos. 1—13 as the trustees (executors) to manage the property on his behalf during his minority. In this will he (the testator) strictly enjoined his two wives not to make any other adoption. Accordingly, when Purshottam Prasadji died on the 10th December, 1901, the defendant No. 14 was, on the 18th December, 1901, installed on the *gadi* as his adopted son, and the defendants 1—13 began to manage the property and continued in possession of it. Soon after this the plaintiff made a claim to the *gadi* and to the property belonging to Purshottam Prasadji, alleging that he was adopted as a son to the deceased by his senior widow on the 15th December, 1901.

On the 27th December, 1901, the plaintiff filed this suit, wherein he claimed the following reliefs:—

“(1) A declaration that the will of the last Acharya is null and void.

“(2) A declaration that, being the nearest relative of the deceased Acharya, he is according to the *Dharma Shastras* and principles of Hindu Law entitled to be the Acharya in his stead, and that he has been placed on his seat by the eldest wife of the late Acharya and Sadhus of the Swaminarayan sect, and that he is therefore the sole ‘*gadipati*’ or owner and holder of the position of such Acharya.

“(3) To obtain a perpetual injunction restraining the defendants from offering any obstruction to his occupying the *gadi*.

“(4) To obtain a perpetual injunction restraining the defendants from placing anybody else on the *gadi*.”

The defendants contended, among other things, that plaintiff's claim was barred by the provisions of section 42 of the Specific Relief Act (I of 1877).

The Subordinate Judge was of opinion that the plaintiff's claim was barred by section 42 of the Specific Relief Act (I of 1877), and he dismissed the suit.

On appeal, the District Judge confirmed this decree. The following were his reasons:—

“Numerous rulings under this section have been quoted at the bar, but, unless I am mistaken in my general estimate of this suit, it will not be necessary to protract this judgment by a detailed consideration of these authorities, for to me at least the question seems hardly to admit of doubt. Plaintiff claims relief by way of declaration and permanent injunction. The question is whether, if he succeeded, he would be entitled to any, and what, consequential relief. Upon this question I am content to take plaintiff's case as he himself puts it, and in accordance with facts established beyond dispute by the evidence. Plaintiff in

1904.

KUNJ BIHARI
v.
KESHAVLAL
HIRALAL.

his deposition (Exhibit 125) says: 'I want to have the position of Acharya and all that is connected with that position; I want all the rights which an Acharya enjoys. I want the rights which the deceased Purshottam Prasad enjoyed in the property. The deity is the owner of the property. The Acharya is the owner of the property for the deity.' Now, even assuming that the full ownership of this property belongs to the general Swaminarayan community, the evidence appears to me to prove beyond doubt, first, that the Acharya is and must be in possession, and, secondly, that he has the management—the almost uncontrolled management—of the temple assets, which exceed 6 lakhs of rupees in value. Admittedly the present defendants are now in possession on behalf of a minor by virtue of a will left by Purshottam Prasad. I infer, therefore, that plaintiff was bound to seek the relief of ousting the defendants and placing himself in possession and management, for this relief would be a necessary consequence of the declarations which he does seek. In support of

- I. L. R. 13 Mad. 75.
 „ 14 Mad. 267.
 „ 15 Mad. 186.
 „ 15 Mad. 15.
 „ 16 Mad. 31.
 „ 18 Mad. 405.

this view I rely on the decisions of the Madras High Court cited in the margin. I do not analyse them more particularly, because, as I have said, the point does not appear to me to need any very exhaustive discussion. I take note, however, of certain cases which Mr. Sankalchand has quoted for plaintiff, and which, in my Judgment, are distinguishable from the present facts. The unreported case quoted from the Madras Law Journal, Vol. X, p. 54, does not assist plaintiff, for that was a suit between two opposing sections of trustees regarding the appointment of a mere servant who had no power over the property. So in I. L. R. 10 Bom. 60, there was no property apparently in litigation, and the decision was confined to the point of the Court-fees leviable. In I. L. R. 22 Mad. 270, the cancellation of an order was all the relief that was needed. Other decisions are also quoted in connection with suits for declaring an adoption valid or invalid, and the Courts have held that they were not then concerned to speculate as to any future manner in which property might change hands; but these decisions seem to me to have no bearing on this case, where the order now sought is an order which would have the immediate effect of transferring from defendants to plaintiff the possession and the almost unfettered management of over 6 lakhs of rupees."

The plaintiff preferred a second appeal, contending that the lower Courts erred in holding that the suit was barred under section 42 of the Specific Relief Act (I of 1877).

G. S. Rao for the appellant (plaintiff).

Scott (Advocate General), with *Ratanlal Ranchhoddas*, for respondents Nos. 1—3 and 5—7.

Phirozshah M. Mehta, with *Ratanlal Ranchhoddas* for respondents Nos. 10—13.

1904.

KUNJ BIHARI
v.
KESHAVIAI
HIRALAL.

The following cases were cited in arguments :—*Farasram v. Bhimbhai*⁽¹⁾; *Sakharm v. The Collector of Thana*⁽²⁾; *Narayana v. Shankunni*⁽³⁾; *Abdul Kadar v. Mahomed*⁽⁴⁾; *Muttakke v. Thimmappa*⁽⁵⁾; *Krishnabhupali v. Ramamurti Pantulu*⁽⁶⁾; *Suryanarayanamurti v. Tammanna*.⁽⁷⁾

JENKINS, C.J.:—The plaintiff brings this suit alleging in effect that on the death of the late Maharaj Shri Purshottam Prasadji Keshaw Prasadji he was installed on the *gadi* of the God Shri Nar Narayan and claiming that he, as its *gadipati*, and nobody but himself has any right to the same.

He charges, however, that a will purporting to be that of the late Acharya Maharaj Shri Nar Purshottam Prasadji, is wrongly being set up, and that the defendants "relying on the aforesaid will, which is fruitless and invalid, are without any authority or any right attempting to place some other person on the *gadi*, and that there is great likelihood of injury to his rights in respect of the Acharyaship, which he therein described."

Accordingly he seeks in effect (1) a declaration that a will set up by the defendants as having been executed by the late Acharya was not executed by him, and that, if it be established, it is not binding; (2) a declaration that the right to become Acharya is his, and he is the owner of the *gadi*; (3) an injunction restraining the defendants from obstructing or causing obstruction to the plaintiff in occupying the *gadi*; and (4) an injunction restraining the defendants from placing any other person on the *gadi*.

His suit, however, has been dismissed, both Courts thinking it was barred by section 42 of the Specific Relief Act.

That section is in these terms :—

"Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may, in its discretion, make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief.

(1) (1903) 5 Bom. L. R. 195.

(2) (1904) 6 Bom. L. R. 124.

(3) (1891) 15 Mad. 255.

(4) (1890) 15 Mad. 15.

(5) (1891) 15 Mad. 186.

(6) (1894) 13 Mad. 405.

(7) (1901) 23 Mad. 504.

"Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so."

Nothing is said here about dismissing his suit: all that is enacted is that no Court shall make a declaration where the plaintiff, being able to seek further relief, omits to do so.

But the prayer in this suit is not limited to one for a declaration; an injunction is sought and that is described in section 52 of the Specific Relief Act as a form of relief, so that even if the words of section 42 could be given the meaning that the plaintiff must ask for all the relief that he is entitled to—a view opposed to the decision of this Court in *Farasram v. Bhimbhai*⁽¹⁾—still there is no warrant for the conclusion that a plaintiff merely by seeking a declaration becomes disentitled to such relief as he has prayed, provided he makes a case showing his right thereto.

On examination it will be seen that the plaint, though meagre and wanting in precision, is not so far beside the mark as has been supposed. The plaintiff's view is that the temple's inams and other property said to be involved in this suit are the endowed property of the deity to whom they have been dedicated, and that to this deity the endowed property belongs, though the affairs of the endowment have to be administered by human agency, and this, the plaintiff claims, is vested in him as the Acharya. The suit, therefore, in the plaintiff's view is not one for the possession of land, but to determine who is to occupy the *gadi*, and thus as *gadinashin* become the human agent of the deity.

If that be so, then an injunction restraining all interference with the occupancy by the plaintiff of the *gadi* secures in the most complete manner to him the rights he claims. We do not say that the plaintiff might not in terms have asked for possession of the office he says is his; we will assume he could, but how would practical effect be given to an award of possession of an office otherwise than by preventing interference with the rights of which it is made up?

We therefore cannot see why the relief of an injunction should not be given if the right claimed be established.

(1) (1903) 5 Bom. L. R. 195.

1904.

KUNJ BIHARI

KESHAVLAL
HIRALAL.

1904.

KUNJ BEHARI

v.

KESHAYLAL
HIRADAL.

But if the plaintiff is able to make out a case entitling him to an injunction, it means that he will have established (1) that he has a title to succeed Purshottam as *gadipati* and (2) that Purshottam's alleged will is of no avail against that title.

From this it becomes apparent that the declarations sought are merely a statement of the grounds on which he is able to succeed, the declaration in respect of the will being in anticipation of the plea founded on the will.

Therefore the awarding of the injunction would actually involve findings by the Court in the terms of the declaration sought, so that at present we fail to see why any construction should be placed on section 42 other than that expounded in *Farasram v. Bhimbhai*.⁽¹⁾

But this point hardly arises at present ; we are only concerned with the dismissal of the suit, and that (in our opinion) cannot be supported on the ground that has prevailed in the lower Courts.

It has been suggested that this is an attempt to evade the Court Fees Act, but if a plaintiff can evade that Act, he may ; the remedy for that lies not in withholding a relief to which he is entitled as of right, but in procuring an amendment of the Act. If it is within the discretion of the Court whether it will grant a plaintiff's prayer or not, then it may be legitimate to consider whether an evasion of the Court Fees Act has been attempted. This suggestion of attempted evasion, however, proceeds on a misconception of the position. Though the property is of great value, it will not, on the theory propounded by the plaintiff, become his, and we will not presume that by malversation he would make it his. If he acts improperly in his office he can be called to account.

The Advocate General has suggested that there is no allegation of obstruction, but *mofussil* pleadings are not construed strictly, and though the plaint is imperfect as a statement of the plaintiff's case, we think obstruction is involved. The defendant's written statement goes a long way to remedy this defect and the matter is made still clearer by the attitude assumed by the defendants here.

(1) (1903) 5 Bom. L. R. 195.

To avoid any question, however, it will be better that the plaintiff should amend his plaint in this respect, and also by defining more precisely the terms of the injunction he seeks.

We, therefore, reverse the decree and remand the case for re-trial. The costs will abide the result.

Decree reversed. Case remanded.

PRIVY COUNCIL.

TURNER AND ANOTHER (DEFENDANTS) v. GOOLAM MAHOMED
AZAM (PLAINTIFF).

P. C.*

1904.

May, 17,
18, 31,

June 22.

[On appeal from the High Court of Judicature at Bombay.]

Charter-party—Power to sublet—Sub-charter—Goods shipped under sub-charter and bills of lading authorized by time charter—Liability of such goods for lien given by time charter—Notice of time charter—"without prejudice to this charter," meaning of—Form, construction, and effect of bills of lading—Lien for hire of vessel.

A vessel was chartered by a firm of merchants in Bombay for six months from 20th August, 1898, at a rate of freight which came to Rs. 18,000 a month, payable in advance. By the charter-party the charterers had the option of subletting the vessel, and it was provided that bills of lading were to be signed at any rate of freight the charterers or their agents might direct "without prejudice to this charter," and that the owner was to have "a lien upon all cargoes for freight or charter money due under the charter. On 26th August the vessel was sublet by the charterers to the plaintiff for a sound voyage from Saigon to Réunion and back from Mauritius to Bombay. The vessel completed the voyage and on 2nd February, 1899, arrived at Bombay with sugar put on board by the plaintiff as sub-charterer, at Mauritius, for which he had received bills of lading from the Captain who signed them without obtaining payment of the month's freight then due under the time charter. The freight on the sugar was prepaid at Mauritius by the plaintiff's agents, so that on the arrival of the vessel at Bombay nothing remained to be paid by the plaintiff to the shipowner in respect of the bill's of lading freight. Delivery of the sugar was, however, refused, the shipowner claiming a lien on it for the Rs. 18,000 due under the time charter. In a suit against the owner and the Captain of the vessel to recover the sugar, or its value and damages for its detention, the defendants relied on the lien under the time charter, and alleged that the Captain had been induced to sign the bills of lading as he did by misrepresentations of the plaintiff's

* Present :—Lord Macnaghten, Lord Lindley, and Sir Arthur Wilson.

1904.

TURNER

v.

GOOLAM
MAHOMED.

agents. It was found that the plaintiff knew of the time charter, and the amount of and terms as to the freight, but that there had been no misrepresentation as alleged.

Held, that the Captain was authorized by the time charter to sign the bills of lading and therefore the shipowner had contracted with the plaintiff to carry the sugar on the terms of the bills of lading. *Colvin v. Newberry* (1); and *Small v. Moates* (2) distinguished. The bills of lading were not mere receipts for the goods shipped; they entitled the plaintiff to delivery of the sugar on payment of the freight due on them, notwithstanding that he had notice of the time charter. Such notice had not the effect of incorporating into the bills of lading any terms inconsistent with them and which the Captain was not bound to embody in them.

Fry v. Chartered Mercantile Bank of India (3); and *Gardner v. Trechmann* (4), followed.

The words in the time charter "without prejudice to this charter," meant no more than that the rights of the shipowner against the time charterer, and *vice versa*, were to be preserved.

Hansen v. Harrold Brothers, followed.

Those words did not override or limit the power of the Captain to issue bills of lading at different rates of freight, or entitle the shipowner to a lien on the goods of persons who had come under no contract with him conferring a lien for the freight, payable under the time charter. A right to seize one person's goods for another person's debt must be clearly and distinctly conferred before a Court of Justice can be expected to recognize it.

Held, therefore (affirming the decision of the High Court on appeal) that the claim of the shipowner to the lien provided by the time charter could not be supported. He was, however, entitled to the benefit of any lien which the time charterer had on the goods of the plaintiff under the sub-charter.

APPEAL from a judgment and decree (19th April and 2nd September, 1901) of the High Court at Bombay reversing a decree (22nd March, 1900) of the same Court passed in the exercise of its Ordinary Original Civil Jurisdiction which latter decree was in the appellant's favour.

The appellant T. Turner was the master of the British steinship "Bombay," and the appellant C. T. Glanville was the owner of that vessel. The respondent Haji Goolam Mahomed Azam was a merchant carrying on business in Bombay and elsewhere. The appeal arose out of an action brought by the

(1) (1832) 1 Cl. & Fin. 283.

(3) (1866) L. R. 1 C. P. 69.

(2) (1838) 9 Bing. 174.

(4) (1884) 15 Q. B. D. 154.

(5) (1824) 1 Q. B. 612.

respondent to recover certain bags of sugar shipped by him on board the "Bombay," or their value, and damages for their detention. The appellants claim a lien for freight on the goods under the following circumstances.

The steamship "Bombay" was by a charter-party, dated August 29th, 1898 (called the time charter), let for six months to Messrs. Issabhoy Thaver and Company, and by an agreement, dated 26th August, 1898, which was subsequently on 13th October, 1898, embodied in a charter-party (called the sub-charter), was sublet by Messrs. Issabhoy Thaver and Company to the respondent for a round voyage.

The time charter was entered into by Messrs. James Mackintosh and Company, the agents in Bombay, of the owners of the vessel, and the material provisions were :—

"Clause 2. The owners shall provide and pay for all the provisions and wages of the Captain, Officers, Engineers, firemen and crew, shall pay for the insurance of the vessel, and for all stores, etc.

"Clause 4. The charterers shall pay for the use and hire of the said vessel at the rate of 7 s. and 6 d. per gross registered ton per calendar month commencing on the day after delivery with a clean and clear hold, notice whereof to be given to the charterers, and at and after the same rates for any part of the month, hire to continue and be computed from such time as the said vessel is so delivered to the charterers until her delivery to owners at expiry of the period above specified (unless lost) at Bombay or Calcutta, charterer's option.

"Clause 8. Payment to be made in cash monthly in advance to owners' agents in Bombay, and in default of such payment or payments as herein specified, the owners or their agents shall have the faculty of withdrawing the said steamer from the service of the charterers without prejudice to any claim they, the owners, may otherwise have on the charterers in pursuance of this charter.

"Clause 14. That the Captain (although appointed by the owners) shall be under the orders and direction of the charterers as regards employment, agency or other arrangements, bills of lading are to be signed at any rate of freight the charterers or their agents may direct, without prejudice to their charter, the Captain attending daily if required at the offices of the charterers or their agents to do so, the charterers hereby indemnify the owners from all the consequences or liabilities that may arise from the Captain doing so, except for short delivery for which the steamer shall be responsible.

"Clause 21. Charterers to have the option of subletting the steamer.

"Clause 22. The owners shall have a lien upon all cargoes for freight or charter money due under this charter: and charterers to have a lien on the ship for all moneys paid in advance and not earned."

1904.

TURNER
v.
GOOLAM
MAROMED.

1904.

TURNER
v.
GOOLAM
MAHOMED.

The amount payable for the use and hire of the vessel under clause 4 of the time charter was £1,197 or Rs. 18,000 per month payable on the 19th of each month.

By the sub-charter the "Bombay" was let for a round voyage from Rangoon or Saigon (at the respondent's option) to Réunion; thence to Mauritius and back to Bombay.

By clause (3) "freight for the round voyage to be paid at the rate of Rs. 1-8 per bag of 168 pounds net which is to be calculated only upon the cargo shipped from Rangoon or Saigon to Réunion." By clause (4) the "Steamer shall sail from Réunion to Mauritius either in ballast or with about 50 tons cargo, and passengers if available, free of freight and there shall load a full and complete cargo of sugar for carriage to Bombay free of freight and so terminate the voyage." By clause (5) "Deck and Cabin passengers from Réunion to Mauritius, and from Mauritius to Bombay to be for the equal benefit of the sub-charterer and the time charterers." By clause (6) "on account of the freight so estimated Rs. 37,500 to be paid at Bombay before steamer's sailing from Rangoon or Saigon, Rs. 25,000 payable on delivery of cargo at Réunion or at Mauritius at the time charterer's option, and the balance at Bombay on right and true delivery of the cargo; but any money expended by the sub-charterer or his agents at any port under inspections either of the Captain or the time charterers for the steamer's disbursement, to be first of all deducted at the port from the sum as stipulated to be payable there." By clause 15 "the Captain, if necessary, to sign bills of lading at any freight without prejudice to this charter-party"; and by clause (24) "the time charterers to have a lien on the cargo for freight and demurrage (if any)."

On 13th October, 1898, the respondent exercised his option and elected that the voyage should begin from Saigon and not Rangoon. This led to some dispute, but on the 19th October a sum of Rs. 18,000 became payable by Issabhoy Thaver and Company under the time charter, and an arrangement was come to between that firm and the respondent which is set out in the following letter written by the former to the latter on 22nd October, 1898 (Exhibit R):

"With reference to the contract entered into between you and me, dated the 26th day of August, 1898, with reference to which there was a dispute between us, I hereby confirm the same and agree that s.s. "Bombay" which is on its way from Aden to Galle or Colombo shall sail direct from Galle or Colombo to Saigon to fulfil the said contract.

"Up to the date of determination of the said contract, dated the 26th August, 1898, between us I hereby request you to pay on my account and as my agent the sum of Rs. 18,000 and so on from month to month up to the said date to

1804.

TURNER

GOOLAM
MAHOMED.

Messrs. James Mackintosh and Company, the agents of the owners of the said steamer, being the monthly sums payable by me to them under the terms of the time charter-party of the said steamer given by them to me and up to the said date to pay and defray as my agent and on my account all monies and expenses payable or to be defrayed by me under the said charter-party until the date of completion of the said contract, dated 24th August, 1898, entered into between you and me. Out of the said sums so paid or to be paid and spent by you on my account and as my agent, you will be entitled to deduct all monies payable by you to me under the said contract and if the monies payable by you to me under the said contract are less than the monies paid or spent by you on my account as aforesaid, I undertake to repay to you the difference on demand. If on the other hand, the monies so paid or spent by you on my account be less than the amount payable by you to me, you will repay the said amount to me on demand. I shall not be entitled to demand payment from you of any monies payable by you to me under the said contract, but you will be entitled to set off the said amount payable by you to me under the contract against the monies paid or to be paid and spent by you on my account as aforesaid.

"I undertake not to revoke this authority until the completion of the said contract between us."

Under the authority given by that letter the respondent advanced the Rs. 18,000 and obtained a receipt for it from Chabildas Lalloobhoy, a partner in the firm of James Mackintosh and Company, agents for the appellant the owner of the "Bombay." The respondent also paid similar sums in November and December. The vessel proceeded to Saigon where the appellant Turner received notice of the sub-charter. On 15th January, 1899, the "Bombay" reached Mauritius and on 19th January another sum of Rs. 18,000 became due to the appellants from the time charterers. At Mauritius the respondent shipped on board the vessel two lots of bags of sugar one consisting of 13,431 bags on 20th January, and the other consisting of 17,076 bags on 21st January, for which he received from the Captain, bills of lading of those dates respectively under which the 13,431 bags were deliverable to the respondent or his assigns "paying freight for the said goods at the rate of 6 annas of 75 kilograms gross French weight shipped paid in Port Louis"; and the 17,076 bags were deliverable similarly except that the freight was stated to be "payable in Port Louis." The freight due in respect of these two shipments of sugar was found by the High Court on appeal, and by their Lordships in this appeal, to have been paid at Mauritius.

1904.

TURNER
v.
GOOLAM
MAHOMED.

The vessel reached Bombay on 2nd February, 1899, and at that time Issabhoy Thaver and Company, the time charterers owed the appellants the sum of Rs 18,000 due on 19th January; and the respondent owed to Issabhoy Thaver and Company the sum of Rs. 5,206-11-4 after taking credit for disbursements on account of the vessel. When the respondent claimed delivery of his shipments of sugar, it was refused by the appellants on the ground that they had a lien on the goods for the Rs. 18,000 which was due to them under the time charter.

The respondent therefore after an offer by him of Rs. 6,000 for freight had been refused filed his suit on 9th February, 1899, for delivery of the sugar or its value alleging that it was wrongfully detained by the appellants.

The appellant Turner in defence asserted that he was lawfully entitled to exercise the lien given by the time charter against the goods claimed in the plaint; that the respondent was all along aware of the terms of the time charter which conferred the lien; and that he, the appellant Turner, was induced to sign the bills of lading for the goods claimed without receiving any freight by misrepresentations made by the respondent's agents.

The second appellant contended that all the cargo shipped by the respondent upon the "Bombay" was subject to the lien given to the owners by the time charter and that the Captain had rightly exercised that lien; that the Captain had no authority to sign the bills of lading without providing that the freight payable in respect of the goods shipped thereunder should be paid to the Captain or the agents of the owner; that the signature of the Captain to the bills of lading was obtained at Mauritius by misrepresentation on the part of the agents of the respondent; and that without prejudice to any of the foregoing defences, the respondent was bound to pay reasonable freight for which the Captain was justified in exercising a lien upon the respondent's goods. He estimated this amount at Rs. 11,798-6-7.

The suit came on for hearing before one of the Judges (Russell, J.) sitting in the exercise of the Ordinary Original Civil Jurisdiction of the High Court. He held that the plaintiff was aware of the time charter and its terms, and that his goods were not exempt from the lien conferred by that charter; that the

bills of lading were signed by the Captain in the form used without the authority of the owners, and that the signature was obtained by misrepresentation, and was affixed by mistake, and the bills of lading had no validity as against the defendants.

The learned Judge further found that under any circumstances the plaintiff was not entitled to demand his goods, or to maintain the suit without tendering the amount due under the terms of the sub-charter, and that no such tender had been made. His decree declared that the defendants were entitled to a lien for Rs. 15,411-12-8 and to be paid the costs of the suit.

From this decision the plaintiff appealed, and the appeal came before a Division Bench consisting of the Chief Justice (Sir L. Jenkins) and Tyabji, J., who held that assuming that the plaintiff had knowledge of the time charter and its terms, that fact was, under the circumstances, not material, and that the owner of the vessel having by the time charter authorized its being sublet, his lien was limited to the freight for which the time charterer had a lien, that is, for the freight due under the sub-charter; that there had been no misrepresentation inducing the signing of the bills of lading, but that the bills of lading were mere acknowledgments of the receipt of the goods, and the rights of the parties were to be determined by the sub-charter. The Court found that the plaintiff was ready and willing to pay Rs. 6,000 in respect of the amount due under the sub-charter, and that if the amount so due was less than that sum the plaintiff was entitled to damages.

The material portions of the judgment of the Chief Justice who delivered the judgment of the Court were as follows :—

I will proceed to consider first whether the plaintiff, as the learned Judge has held, stepped into the shoes of the time charterers: for admittedly, if he has, the plaintiff's claim fails.

Mr. Justice Russell's decision on this point proceeds upon the view he took of the undated letter Exhibit B, written on the 22nd October by the time charterers: for it appeared to him that thereby the plaintiff agreed with Issabhoj Thaver & Co. to pay to the owners Rs. 18,000 per month in advance during the currency of the charter. Even assuming that such an agreement would have had the result ascribed to it, I am unable to agree with the construction placed by the learned Judge on the letter. The plaintiff, no doubt, was anxious to secure the ship for his venture and he was aware that for that purpose the time charterers must pay the owners Rs. 18,000 a month. He further wished to ensure that this

1934.

TURNER
v.
GOOLAM
MAHOMED.

1904.

TURNER
v.
GOOLAM
MAHOMED.

sum should be paid, and was up to a point prepared to make the necessary payments himself, provided he saw his way to reimbursement. It was to secure this end that he procured that letter from the time charterers : it entitled him to make the necessary payments on the time charterers' account and to deduct the amount from the sums payable by him to them. To further secure his position there was a provision entitling the plaintiff to repayment of any uncovered balance and an undertaking on the part of the time charterers not to revoke. But I fail to see in this anything which imposed on the plaintiff an obligation to continue payments of the instalments. Therefore I think the learned Judge has attributed to Exhibit R a force of which it is not capable. I do not propose to elaborate this point further, as the Advocate General has conceded that he cannot support the construction placed by the learned Judge on Exhibit R. But while making this concession he did not give up his contention that the plaintiff was under an obligation : this, he maintains, arises out of an oral agreement independent of Exhibit R. He is unable to point to any direct evidence of this agreement, but he argues it is the just inference to be drawn from the language of the correspondence.

No doubt the time charterers and their attorneys not once only but continually alleged an obligation on the plaintiff's part, but they were throughout met with an emphatic repudiation. It is true also that in the letters written by the plaintiff to his agents he uses expressions capable of an interpretation that he regarded himself as under a legal obligation ; but it appears to me that they are equally referable to the plaintiff's knowledge that having regard to the time charterers' financial position if he wanted to preserve the charter-party from determination he must make the necessary payments. But the direct evidence as to a separate agreement is all against the defendants' suggestion : for the result of the evidence given by him and his attorney is that the arrangement between the parties was embodied in Exhibit R and no agreement other than R is hinted at in the correspondence.

Russell, J., held as a fact that the agreement between the parties was in the terms of Exhibit R : he did not find there was any other agreement and I, too, think no such agreement is proved and therefore the defendants' contention on this point fails.

It is next said that the bills of lading were obtained under circumstances which disentitle the plaintiff to any answer he might otherwise have to the lien claimed : for it is alleged the Captain was induced to sign the bills of lading in their existing form by the misrepresentations of the plaintiff's agents. Assuming for the sake of argument that the misrepresentation could have the legal result for which the defendants contend, it is important to see how the misrepresentation has been formulated by them.

After referring to the defendants' pleadings and to the other evidence on the point, the judgment continued :—

Mr. Justice Russell, in dealing with the evidence, expresses the opinion that "the Captain's evidence is to be believed and the plaintiff's agent's evidence at

Mauritius is not credible." The Mauritius agent's evidence was taken on commission, and the learned Judge in reference to it has said: "Is so untrustworthy that Mr. Macpherson did not attempt to rely upon it." Before us it is said that the learned Judge was under a complete misapprehension as to Mr. Macpherson's attitude and in his estimate of the evidence. I have referred to these matters at length as I have the misfortune to differ with the view of the learned Judge on this question. I do so with great hesitation, but I cannot accept his estimate of the master's evidence. The master, it is true, was examined before the learned Judge, but it was on a *de bene esse* commission a considerable time before the trial. But what emboldens me to differ is that I do not find there was present to the mind of the learned Judge those circumstances of suspicion which I have set forth. The truth is that in the view taken by Russell, J., of Exhibit R the rest of the case was but of secondary importance. The onus lay on the defendants to establish by clear evidence a misrepresentation affecting the rights of the parties, and this in my opinion they have not done. I come to this conclusion not so much because I believe the Mauritius evidence (though I fail to see how it merits the absolute rejection it has incurred) as because the evidence for the defence fails to convince me on this point.

This brings me to the question of notice which has been argued before us. Now there can be no doubt that from the first the plaintiff knew of the existence of the time charter: the firm offer itself purports to come from the time charterers. Lord Romilly in *Peck v. Larsen*⁽¹⁾ said: "I fully admit that every person is bound by the contents of a charter-party of which he has notice. If he does not choose to enquire what the contents of the charter-party are, that is his own fault, and he must take the consequences of it." It may perhaps be a question whether this doctrine of imputed notice should in a commercial connection transaction be carried as far as this passage indicates, but here, it is said, the plaintiff had actual knowledge of the contents of the charter-party.

After considering the evidence as to the plaintiff's knowledge the judgment proceeded:—

Though it may fairly be inferred from these passages that the plaintiff was acquainted with the terms of the time charter-party, it does not necessarily follow from them that the plaintiff *must* have had that knowledge: so that there is nothing in the plaintiff's denial of knowledge. Mr. Justice Russell, however, before whom the plaintiff was examined at the trial, disbelieved his evidence in this point, and I am not prepared to say that the learned Judge's appreciation of the evidence was wrong: more especially when I find that the plaintiff has attempted to dissociate himself from knowledge of the time charter-party to an extent that the facts do not justify.

Assuming, then, that the plaintiff had this knowledge, what is the legal result? Notice so often has the effect of imposing a liability where none would

1904.

TURNER
v.
GOOTAM
MAHOMED.

(1) (1871) L. R. 12 Eq. 378 (383).

1904.

TURNER
v.
GOOLAM
MAHOMED.

otherwise exist, that one is apt to be led into the thought that established notice has in all cases some form of extended liability as its necessary sequel. But it is incumbent to see what it is that is brought to notice. What did the plaintiff learn when the contents of the charter-party came to his knowledge? He learnt the actual legal relations of the parties and their mutual rights and liabilities. But this is precisely what we have to determine for the purposes of this case.

Therefore I now propose first to examine the provisions of the charter-party: for it is on the effect of that document that this case primarily turns. By the charter-party the vessel is let to the charterers for a term of six calendar months (clause 1): the charterers are to pay for the use and hire of the vessel (clause 4): the payments are to be made in cash monthly in advance to the owners' agents in Bombay with power of withdrawal in the event of default (clause 8): the Captain is under the orders and directions of the charterers as regards employment, agency or otherwise, and bills of lading are to be signed at any rate of freight the charterers or their agents may direct without prejudice to the charter-party (clause 14): the charterers are to have an option of subletting the steamer (clause 21): and the owners are to have a lien upon all cargoes for freight or charter money due under the charter.

The power of subletting the steamer is unqualified by any stipulation as to the rate of freight, place of payment, hire, or otherwise: it is an absolute power to sublet. It is a concession obviously in the charterer's favour, and must be intended to confer some benefit on him beyond what would arise from mere assignment of the charter-party rights. The position is very clearly described by Lord Esher in *Hansen v. Harrold Brothers*.⁽¹⁾ The question there was as to the liability of a charter under the common cesser clause. There was a lump sum charter-party with power to re-charter without prejudice to the charter-party and a provision for the Captain to sign bills of lading at any rate of freight: the charter-party contained a cesser clause: the charterers re-chartered and goods were shipped under the sub-charter: bills of lading were given providing for a freight which worked out to less in amount than the lump freight. The owners sued their charterers for the difference and were met by a plea of the cesser clause. The claim was awarded.

Now it will be seen that this case, though differing materially in form from the present, calls into play and, in fact, depends on principles pertinent to the question now before us. Lord Esher in the course of his judgment said at page 619:—"The meaning of the words 'without prejudice to the charter-party' has been settled by decisions which cannot be questioned. The meaning as settled by the cases of *Shand v. Sanderson*⁽²⁾ and *Gledstanes v. Allen*⁽³⁾ is that it is a term of the contract between the charterers and the shipowners that notwithstanding any engagements made by the bills of lading, that contract

(1) (1894) 1 Q. B. 612 (619): 63 L. J. Q. B. 744 (747).

(2) (1859) 4 H. & N. 381: 28 L. J. Exch. 278.

(3) (1852) 12 C. B. 202.

1904.

TURNER
&
GOOLAM
MAHOMED.

shall remain unaltered. Therefore in this case the Captain was bound to sign the bill of lading presented to him; but his doing so was to be 'without prejudice to the charter-party.' These words do not limit the obligation under the charter-party to sign the bills of lading presented to him: but when he has done so it does not affect the contract contained in the charter-party. If a shipowner puts up a ship as a general ship, he may insist on a bill of lading in any terms he pleases, or he may refuse to take the goods. Here the shipowner deprives himself of that right and agrees to sign bills of lading as presented, but that is not to affect the charter-party. Therefore the Captain was bound to sign the bill of lading which he did. The shipowner in this case has put it into the power of the charterers to re-charter the ship and to allow the sub-charterer to make any stipulation he pleases as to the rate of freight in the bill of lading and accordingly the charterers exercising that power, the bill of lading freight has been made by the sub-charterers payable according to the weight of the cargo delivered at the port of discharge, which necessarily made the bill of lading freight not equivalent to the balance of freight payable under the charter-party." Later on he says: "In this case, therefore, as, by the act of the charterers, the bill of lading freight was not equivalent to so much of the chartered freight as remained due after the payment made at the port of shipment, the cesser clause does not relieve the charterers, but leaves them liable for what is not covered by the lien under the bill of lading."

Lord Davey (then Davey, L. J.) also delivered judgment in the case, and I would refer to the following passage in his judgment at p. 621: "Then whose fault is it that the shipowner in this case has not got the lien for which he stipulated? The defendants' counsel says that it is the Captain's fault and he bases his argument in that respect on the Scotch case of *Arrospe v. Barr* (1). Notwithstanding some of the dicta attributed to the Lord President in that case I do not regard it as an authority for the proposition that the master could have and ought to have refused to sign the bill of lading presented to him, unless words were inserted in it which would have the effect of incorporating all other provisions of the charter-party except that as to the rate of freight. I do not think that the case is an authority for more than this, *viz.*, that except so far as the rate of freight is concerned he ought not to sign any bill of lading which contains provisions at variance with the charter-party. I am not prepared to say, if the Captain had insisted on having created by the bill of lading a lien in favour of the shipowner, not only for the bill of lading freight, but also for the charter-party freight, that such a stipulation would have been consistent with the obligation to grant a bill of lading at any or (it may be) a lower rate of freight. Whether that be so or not, I am of opinion that it must be taken to be the fault of the charterers that the lien which they contracted in the charter-party to create or procure for the ship-

1904.

TURNER
v.
GOOLAM
MAHOMED.

owner was not created or procured. If they elected to re-charter the ship, they might have made a stipulation with the sub-charterers that they should create or procure such a lien as the charter-party contemplated. The master was in my opinion guilty of no negligence or default in signing the bills of lading which he signed. I think the charterers made default in not making such arrangements with the sub-charterers and through them with the actual shipper as to procure such a lien. The result is that, the bill of lading freight only covering a portion of the charter-party freight, there is no lien to secure that portion of the charter-party freight which was not covered by the bill of lading freight: and, whether the case is put on the ground of condition precedent or on the ground of breach of contract for which the damages are the difference between the two freights, the result is the same. For these reasons I agree that the appeal should be dismissed." It is throughout that case assumed that the owner had no lien against the shippers for more than the freight under the sub-charter; that in fact is an essential part of the *ratio decidendi*. It may be objected that they were not then considering the effect of notice, but the judgments in no way proceed on the absence of notice, while Lord Davey in expressing a doubt whether the Captain could have insisted on a lien for the charter-party freight could not have thought that an essential condition. Now if that be the real *ratio decidendi*, how far it is applicable to this case. To determine that we must see what precisely are the facts here. The power of subletting has been exercised and a sub-charter taken in the name of the plaintiff at a specified rate of freight or hire amounting to Rs. 80,000 odd. Under this sub-charter, which, by the way, was prepared at Chabildas' office, the freight was payable as to Rs. 37,500 in Bombay before sailing from Saigon, Rs. 25,000 on delivery of cargo at Réunion or Mauritius at the time charterers' option and the balance at Bombay on delivery of the cargo, but any money expended by the sub-charterer or his agents at any port under instructions either of the Captain or the time charterers for the steamer's disbursement to be first of all deducted at the port from the sum as stipulated to be payable there (clause 6). The Captain is, if necessary, to sign bills of lading at any freight without prejudice to the sub-charter. Goods were shipped by the plaintiff at Mauritius and the evidence of the Captain and the supercargo shows this was done under the sub-charter. The plaintiff got two bills of lading, one for 13,431 bags of sugar at the rate of 6 annas of 75 kilograms French weight shipped paid in Port Louis, and the other for 17,076 bags of sugar at the rate of six annas payable in Port Louis. In both bills it is stated that the goods are shipped by the plaintiff.

Therefore on the face of things we have the position of bills of lading given to a sub-charterer in respect of goods loaded under his sub-charter. If this be also the real position then as between the plaintiff and the time charterers the bill of lading was a mere acknowledgment of the receipt of the goods: the contract between them is the sub-charter, and the freight payable to the time

charterers is that stipulated for in the sub-charter. It would follow that the shipowner having authorized the subletting, his lien must be limited to the freight for which the time charterers had a lien : in other words his lien cannot exceed that of the time charterers : in effect it is limited to the freight payable under the sub-charter.

But then the Advocate General taking advantage of an argument advanced by Mr. Inverarity has contended that we have not here the case of bills of lading given to a sub-charterer. He has acceded to plaintiff's suggestion that the real sub-charterers were a firm of which the plaintiff was a member. Starting from here it is argued that the shipowner is under these circumstances entitled to the bill of lading freight. But to this it is answered that this freight has been paid. This is a question of fact, and looking at all the evidence I think it is shewn that the plaintiff's agents in January did settle accounts between the plaintiff and the plaintiff's firm, and in that account the plaintiff was treated as having paid the bill of lading freight. It is true those accounts did not come before the plaintiff until later, but they were adopted with the result, as I think, that as between the plaintiff and his firm the bill of lading freight must be deemed to have been paid. For the defendants it is then urged that the bills of lading could not be signed by the master in that form; that they could only provide for freight payable in Bombay. Assuming for the moment that this is so, it clearly is a defence of which the master cannot avail himself, and though this may not make any great difference, so far as actual recovery by the plaintiff is concerned, it would have an important bearing on the question of costs. But are the defendants right when they contend that the freight under the sub-charter party could not be made payable at Port Louis? The goods, as I have already said, were loaded under the sub-charter, and that was a contract between Issabhoy and the sub-charterers. Therefore it was competent to them to make any alterations they pleased in the terms of their sub-charter and we know as a matter of fact that an alteration was actually made. But then these two bills were drawn by the Captain with the consent of Alibhoy, the time charterer's agent and there is absolutely no evidence that his principal ever repudiated or now disapproves of what has been done, therefore it appears to me not to be open to the defendant owner to contend that the bills could not be made payable in the way they were.

I may here conveniently notice a counter argument of the plaintiff based on the hypothesis with which I am now dealing, *viz.*, that his firm really were the sub-charterers. He argues that as the freight was paid under the bills of lading there is no freight payable and consequently nothing on which Issabhoy can have a lien. But there appears to me to be two initial difficulties in the way of this argument which form a complete answer to it. Whatever may have been the arrangement between the plaintiff and his firm, as between him and Issabhoy he was the only disclosed sub-charterer : if he had principals they were undisclosed and Issabhoy could not be prejudiced by their existence. And in the next place the plaintiff in advancing this argument is giving the go-by to his own pleadings in which he alleges the sub-charter to have been made with

1904.

TURNER

v.

GOOLAM
MAHOMED.

1904.

TURNER
v.
GOOLAM
MAHOMED.

himself, and never for a moment suggests that he was acting in the matter otherwise than as principal.

The conclusion therefore to which I come is that for the purposes of this case the plaintiff must be taken to be the sub-charterer and that Issabhoj therefore had a lien on the cargo for the amount due under the charter-party so that to this extent the defendants were entitled to a lien.

I will now deal with certain other arguments that have been advanced.

I have already indicated that one of the principal points urged by the defendants was that the plaintiff stood in the shoes of the time charterers and had identified himself with them. I have already dealt with this point so far as it was sought to support it on the grounds of misrepresentation, notice, and an assumption of legal obligation under Exhibit R or some other agreement. That, however, does not exhaust all the grounds urged by the plaintiff in this connection. Now it is said that in November for a consideration moving from the plaintiff the owner or his agents altered the charter-party for the plaintiff's benefit by allowing the ship to go to Saigon, and that this brought the plaintiff within the doctrine of identification. This contention is to my mind untenable; there is no evidence that Chabildas ever entered into an agreement with the plaintiff to take the ship to Saigon, and he does not venture to go into the box to say he even understood that there was such an agreement. The contention, moreover, is inconsistent with the undertaking in the receipt to refund the Rs. 18,000 in the event of the steamer not sailing to Saigon * * * * *

Cases have been brought to our notice for the purpose of showing that the doctrine of identification is applicable, or in other words that the plaintiff is not (as it has been termed) a stranger to the contract; but in examining them it has to be borne in mind that questions like the present must depend upon the particular contracts and facts of each case, and it is unsafe to rely on any general expression or principle as applicable. The Advocate General has relied on *Christie v. Lewis*⁽¹⁾ as showing that the freight under the bills of lading was recoverable by the shipowner, but that case is distinguishable on two grounds: first the goods were not, as here, loaded under an authorised sub-charter-party, and secondly the goods in respect of which bills were given were those of third parties, and not, as here, of the sub-charterer.

Reynolds v. Jeal⁽²⁾, again, was a decision on facts so dissimilar from the present as to be no guide. What was there decided was that it was outside the scope of the master's authority to make bills of lading under which the freight was payable to the charterer's agents as security for advances to the master. But there again there was no opportunity of considering what was the effect of a power to sublet such as we have here: that really is the whole crux of the case.

Then we were referred to three cases which were said to illustrate favourably to the defendant the doctrine of identification.

The first of the series is *Foster v. Colby*⁽³⁾ which was an action of trover for a quantity of linseed brought against the master. The case is cited for the

(1) (1821) 2 Brod. and Bing. 410. (2) (1865) 34 L. J. Q. B. 251: 7 B & S. 86.

(3) (1858) 28 L. J. Exch. 81 (86).

1904.

TURNER
v.
GOOLAM
MAHOMED.

principle enunciated by Pollock, C. B., in these words: "I would rather put my judgment on the plain, clear and honest principle, that a *bond fide* indorsee of a bill of lading, having no notice whatever of any charter-party, or any other freight to be paid, except that which is expressed in the bill of lading, and not colluding with any person to get an advantage that he is not entitled to,—that the plaintiffs standing in that situation, as *bond fide* indorsees of the bill of lading, are entitled to the goods, on payment of the freight stipulated in the bill of lading." Had the facts giving rise to those remarks existed here, obviously they would have been most pertinent, but the whole question here is whether the documents have not vested in the plaintiff the rights he claims and on that the decision throws no light.

Shand v. Sanderson (1) simply follows *Foster v. Colby* (2) which it is said must govern in the absence of fraud. Possibly it was this reference to fraud that induced the Advocate General before us to open the case of fraud which we have already decided was not open to him.

Then there is the case of *Kern v. Deslandes* (3). It was there said "All the cases show that as against the charterer there is a lien on his goods for the amount of the charter freight. From the moment, therefore, the goods were put on board, they were, as against Ferguson" (he was the charterer and shipper) "and those who must stand on his title, bound by that lien under the express terms of the charter-party." The case then goes on to show that the Gregorys did stand on the plaintiff's title, and obviously they did. Their only title to the goods was from Ferguson by whom they had been shipped and they acquired that title with notice of the lien to which the goods were subject in Ferguson's hands and consequently their title was necessarily subject to the same lien. There is no similarity here to that state of facts. The goods are the plaintiff's, and he has acquired them from no one who was in the position of charterer to the owner. Thus the expression "not a stranger to the charter-party" has been much used in the argument before us: it is no doubt a convenient phrase but to appreciate its applicability one has to see what was the contract in those cases where the facts it implies result in an extended liability, and to compare or contrast them with the contracts in this case: for obviously if the charter-party here contemplated the introduction of a third party into the position occupied by the plaintiff free from an unlimited lien, it would be to no purpose to rely on decisions imposing liability under circumstances bearing a general resemblance, if the contract on which they proceeded was not capable of the same construction.

Holding then as I do that the legal result of the documents and evidence in this case is that there was a lien against the plaintiff only for the amount of the sub-charter freight it is necessary to determine what that amount is.

The parties are not at one on this and they have accordingly agreed that it shall be determined hereafter. Assuming that the amount found due is less

(1) (1859) 4 H. & N. 381: 28 L. J. Exch. 278. (2) 1858) 28 L. J. Exch. 81 (86).
(3) (1861) 30 L. J. C. P. 297 (301): 10 C. B. N. S. 205 (225).

1924.

TURNER
v.
GOOLAM
MAHOMED.

than Rs. 6,000 then I think the plaintiff has been right. That sum he was ready and willing and offered to pay unconditionally and under circumstances to which no exception could be taken. Therefore if the balance due is less than Rs. 6,000 the plaintiff is entitled to damages, but we have not had placed before us materials on which the amount can now be determined.

By the decree the decision of the Court below in favour of the defendants was reversed and they appealed to His Majesty in Council.

T. G. Carver, K.C., and *A. Adair Roche* for the appellants contended that by the terms of the time charter they were entitled to a lien upon the goods of the respondent for sums due under that charter for the hire of the vessel. The power given to the time charterer to sublet was to be exercised subject to the terms of the time charter; he could not give any one more than he himself had under that charter, and therefore he could not give the respondent as sub-charterer the right to ship goods free from the lien conferred by the time charter. It had been found both by the first Court and by the Court of appeal that the respondent had knowledge of the time charter and of its terms, and such notice had the effect that he was bound by the terms of that charter, and among other terms by those of clause 22 which gave the owners a lien on all cargo shipped on the vessel. The sub-charter therefore could not get rid of that lien. Reference was made to *Peek v. Larsen*⁽¹⁾ per Lord Romilly; and *Ralli Brothers v. Paddington Steamship Company*⁽²⁾ per Mathew, J., As to the amount of the lien, therefore, the appellants were not, as held by the High Court on appeal, limited to the amount due under the sub-charter. Nor did the bills of lading get rid of the lien given by the time charter: if they had any such effect the Captain had no authority to sign them in that form. *Reynolds v. Jex*⁽³⁾ and *Small v. Moates*⁽⁴⁾ were cited. He had no power to sign bills of lading which were inconsistent with the owners' power, under the time charter clause 8, of withdrawing the vessel, or with their lien (under clause 22) on all goods put on board. The only bills of lading he had authority to sign were those "without prejudice to" the time charter. Reference was made to *Hansen v. Harrold*

(1) (1871) L. R. 12 Eq. 378 (383). (3) (1865) 34 L. J. Q. B. 251; 7 B. & S. 86.

2) (1900) 5 Commercial Cases 124.

(4) (1833) 9 Bing. 574.

1904.

TURNER
v.
GOOLAM
MAHOMED.

Brothers⁽¹⁾. It was not assumed in that case, as the High Court on appeal says it was, that the shipowner had no lien against the shippers for more than the freight under the sub-charter. If on the other hand the bills of lading were mere receipts for the goods shipped, the respondent had no greater rights than the time charterers themselves had. As to the relation to the shipowner in which a man stood who put goods on board without a contract except with the charterer, reference was made to *DeLaurier and Company v. Wyllie*⁽²⁾. It was also contended that the evidence showed that the Captain's signature to the bills of lading had been obtained by misrepresentation by the respondents' agents, and was given under a mistake as to the facts, and that this made the bills of lading invalid as against the appellants; and reference was made to the Contract Act (IX of 1872), s. 19.

J. A. Hamilton, K.C., and *Lauriston Batten* for the respondent contended that the appellants had no lien under the time charter on the goods shipped by the respondent. Such a right, if it existed, must have arisen out of a contract between the ship-owners and the respondent, but no such contract, either express or implied, had been proved. The respondent had not consented in any way to his goods being subject to a lien which he was under no obligation to pay. He would have been entitled to have the goods he had shipped returned to him if he had been told before the ship sailed that the whole amount of lien under the time charter might be enforced against the goods. *Tharsis Sulphur and Copper Mining Company v. Culliford*⁽³⁾ was cited. The evidence showed that the goods put on board by the respondent were shipped under the sub-charter which was one that the time charterers had power to make, and his contract as to the goods was under the sub-charter and the bills of lading which both under the time charter and the sub-charter the captain had authority to sign; and by that contract alone the respondent should be bound. His goods were therefore liable only for the lien provided by the sub-charter. The respondent when he shipped the goods knew there was a time charter, but there was nothing to show that he knew its terms. The doctrine

(1) (1894) 1 Q. B. 612 (619) : 63 L.

J. Q. B. 744 (747).

(2) (1889) 17 Court of Sessions Cases,
4th Series, 167 (191).

(3) (1873) 22 W. R. (Eng.) 46.

1904.

TURNER
v.
GOOLAM
MAHOMED.

of notice, moreover, must be applied; if, at all, with its limitations and one of them was that it did not apply to a chattel interest. As to the authority of the Captain to sign the bills of lading reference was made to *Small v. Moates*⁽¹⁾; *Gleds'aves v. Allen*⁽²⁾; *Kern v. Deslandes*⁽³⁾, and *Reynolds v. Jex*⁽⁴⁾; and *The "Shillito"*⁽⁵⁾ per Barnes, J., was relied upon. The respondent was entitled to delivery of his goods on payment of an amount which might be less than that due under the time charter. *Hansen v. Harrold Brothers*⁽⁶⁾ was referred to with reference to the words in the time charter "without prejudice to this charter," it being contended that they did not deprive the Captain of authority to sign such bills of lading as he had done for the respondents' goods. Clause 14 of the time charter was not a personal clause applying only to the time charterer himself. The true construction of the time charter was that the time charterer had power to sublet on terms not included in the time charter. The case of *Peek v. Larsen*⁽⁷⁾ had only one sentence by Lord Romilly pertinent to the question for decision in this case and that was not conclusive. Reference was made to *Sewall v. Burdick*⁽⁸⁾; *Leduc v. Ward*⁽⁹⁾; *Rodocanachi v. Milburn*⁽¹⁰⁾; and *Haywood v. Brunswick Building Society*⁽¹¹⁾: the only lien which could be enforced against the respondents' goods was for what was due under the sub-charter; this he had been always ready and willing to pay.

As to misrepresentation it was submitted there was none proved, but if it were proved it was not material because it was not false to the knowledge of the person making it: the Captain had full power and opportunity of ascertaining whether what was stated was true or not, and was not induced by it to sign the bills of lading.

Carver, K.C., replied contending that there was no foundation for the contention that there could be no lien under the time

(1) (1853) 9 Bing. 574 (579, 591, 592) (3) (1861) 10 C. B.N. S. 205 : 30 L. J. C. P. 237.

(2) (1852) 12 C. B. 202.

(4) (1865) 34 L. J. Q. B. 251 : 7 B. & S. 86.

(5) (1897) 3 Commercial Cases 44 (45, 47, 48).

(6) (1894) 1 Q. B. 612 (619) : 63 L. J. Q. B. 744 (747).

(7) (1871) L. R. 12 Eq. 378.

(9) (1838) 20 Q. B. D. 475 (479).

(8) (1831) 10 App. Cas. 74 (105).

(10) (1886) 18 Q. B. D. 67.

(11) (1881) 8 Q. B. D. 403 (406).

charter on the respondents' goods unless there was a contract between the respondent as shipper of the goods and the shipowners: the lien arose if the shipper knew the terms of the time charter. But if it were necessary to show a contract there was, it was submitted, an implied contract between the shipowners and the respondent sufficient to render the latter liable for the lien claimed on his goods: the respondent had taken advantage of the time charter, and had treated the vessel as practically his own.

1904.

TURNER
v.
GOOLAM
MAHOMED.

The judgment of their Lordships was delivered by—

LORD LINDLEY:—The question raised by this appeal is whether the appellants, who are shipowners, are entitled to a lien for freight payable under a time charter on the goods of the respondent who was no party to that charter, but whose goods were carried in the appellants' ship under a sub-charter and bill of lading. The Judge of First Instance decided this question in favour of the appellants. His decision was reversed by the Court of Appeal in Bombay, and the present appeal is from the decision of that Court.

The undisputed facts are as follows:—

The appellant Glanville was the registered owner of the steamship "Bombay," and the appellant Turner was her Captain. By a charter dated the 20th August, 1898, and entered into by the agents of the owners and some Bombay merchants named Issabhoj Thaver & Co., the owners agreed to let and the charterers agreed to hire the ship for six calendar months. She was placed at their disposal with a full complement of officers and men at Bombay for employment in the Indian Ocean and other Eastern waters as the charterers or their agents should direct, on certain conditions of which the following are important:—(2) The owners were to pay the Captain and crew. (4) The charterers were to pay freight monthly in advance at the rate of 7s. 6d. per ton, which came to Rs. 18,000. (8) In default of such payment the owners were entitled to withdraw the steamer from the service of the charterers without prejudice to any claim the owners might otherwise have against them. (14) The Captain, although appointed by the owners, was to be under the orders and directions

1904.

TURNER

v.

GOOLAM
MAHOMED.

of the charterers as regards employment, agency, or other arrangements. Bills of lading were to be signed at any rate of freight the charterers or their agents might direct without prejudice to that charter, and the Captain was to attend daily, if required, at their offices to do so. The charterers were to indemnify the owners from all consequences or liabilities that might arise from the Captain doing so except for short delivery. (21) The charterers were to have the option of subletting the steamer. (22) The owners were to have a lien upon all cargoes for freight or charter money due under the charter, and the charterers were to have a lien on the ship for all moneys paid in advance and not earned.

The 14th, 21st and 22nd conditions are those which have given rise to the controversy between the parties; but, before considering them, it will be convenient to state what was done, and, for the purpose of avoiding confusion, the charterers under this charter will be referred to as the "time charterers" in order to distinguish them from the respondent, who is their sub-charterer.

Shortly after the time charter was made the ship was sub-chartered to the respondent for a round voyage from Saigon to Réunion and back from Mauritius to Bombay. She was to take rice from Saigon to Réunion and sugar from Mauritius to Bombay. Freight was to be payable for the whole voyage at the rate Rs. 1-8 per bag of 168 lbs., calculated only on the cargo shipped from Saigon to Réunion. There was to be no freight payable by the sub-charterer to the time charterer for any other cargo. On account of the freight thus estimated, Rs. 37,500 were to be paid at Bombay before the steamer sailed from Saigon, Rs. 25,000 at Réunion or Mauritius, and the balance was to be paid at Bombay after delivery of the cargo there.

It will be observed that neither of these documents took the ship out of the legal possession of the owners so as to deprive them of the power of detaining goods on board, and of enforcing any lien to which they might be entitled. The Captain retained possession for the owners, and was in a position to enforce the lien expressly conferred by the time charter if it was properly enforceable against the goods in question.

The steamer completed this voyage, and on the 2nd February, 1899, she arrived at Bombay, having on board a quantity of

1904.

TURNER
v
GOLLAM
MAHOMED.

sugar put on board, by the sub-charterer at Mauritius, and for which he had received bills of lading from the Captain. The freight payable by these bills of lading was at the rate of 6 annas per 75 killograms, and this freight was prepaid by the sub-charterer, in Mauritius, so that when the ship arrived in Bombay nothing remained to be paid by the sub-charterer to the owners in respect of the bill of lading freight. It appears, however, that something was due from the sub-charterer to the time charterers for money payable under the sub-charter.

There was also due to the owners a month's freight, *i.e.*, Rs. 18,000 (£1,197) from the time charterers under the time charter, and the owners claimed a lien for this amount on the sub-charterer's sugar. Hence the dispute between the parties. The sub-charterer brought an action to recover his sugar, or its value, and damages for its detention, and the shipowners defended the action relying on their lien.

So far there is no dispute about the facts. The shipowners, however, also defended the action upon the ground of misrepresentation alleged to have been made by the sub-charterer to the Captain before the sugar was shipped, and on the faith of which he is said to have signed the bills of lading.

This alleged misrepresentation was denied and a considerable amount of evidence upon it was adduced. The Judge of First Instance thought the defence proved. But the Court of Appeal took a different view. The evidence has again been laid before their Lordships and they have carefully considered it. It appears that the sub-charterer had paid to the agents of the shipowners some of the freight payable in advance under the time charter, and there was undoubtedly some misunderstanding on the part of the Captain as to similar payments being made in future. But their Lordships are not satisfied that the sub-charterer made any false statement to the owners' agents or to the Captain, nor any representation or promise which could confer on the owners any lien on the sub-charterer's goods other than such as the documents above referred to entitle them to assert.

Their Lordships, however, agree with both Courts in India in their conclusion that the sub-charterer knew, in a general way, of the time charter, and that the freight payable under it by the time charterers was Rs. 18,000, payable monthly in advance.

1904.

TURNER
v.
GOOLAM
MAHOMED.

Bearing these conclusions in mind, their Lordships will consider the legal position of the parties.

The first question which arises is the effect of the bills of lading. Apart from them there was no contract between the shipowners and the sub-charterer. But he shipped his sugar on board the steamer on the terms of those bills of lading, and the Captain was authorised by the time charter to sign them. Whether he signed them for the shipowners or for the sub-charterer he had express authority from the shipowners to sign them. Under these circumstances the shipowners appear to their Lordships to have contracted with the sub-charterer that his sugar should be carried to Bombay in that ship on the terms of the bills of lading. This distinguishes the present case from *Colvin v. Newberry* ⁽¹⁾, where the bill of lading given by the Captain of a chartered ship was held to bind the charterer only, although the shipowners retained possession of the ship by the Captain. Nor is the present case governed by *Small v. Moates* ⁽²⁾ and others of that class, where the holder of the bill of lading had no better title than the charterer who was himself the Captain of the ship and the original shipper of the goods.

It further appears to their Lordships that the bills of lading in this case are not mere receipts for goods given to a charterer already bound to the shipowner by a charter-party entered into between them and which the Captain had no authority to depart from.

Unless, therefore, the fact that the sub-charterer had notice of the time charter makes a difference, the bills of lading entitled him to have his goods delivered to him on payment of the bills of lading freight. This was decided in *Fry v. The Chartered Mercantile Bank of India* ⁽³⁾, which was followed in *Gardner v. Trechmann* ⁽⁴⁾. In both of these cases the bill of lading expressly referred to the charter-party, but not in such a way as to incorporate either the obligation to pay the charter freight or the lien for it.

These cases, and others like them, show that notice by a shipper of a charter-party has not the effect of incorporating into

(1) (1832) 1 Cl. & Fin. 283.

(2) (1883) 9 Bing. 574.

(3) (1866) L. R. 1 C. P. 689.

(4) (1884) 15 Q. B. D. 154.

the bill of lading any terms which are inconsistent with it and which the Captain was not bound to embody in the bill of lading. If the charter-party shows that the Captain exceeded his authority in signing the bill of lading, and the shipper knew this, he cannot enforce the terms of the bill of lading uncontrolled by the charter-party. If the shipper knew that there was a charter-party, and had an opportunity of reading it, and did not trouble himself about it, he might be treated as knowing its contents. In the present case the time charterer had authority to let other persons have the use of the ship for six months for any voyage in the waters mentioned in the time charter. The Captain was not only empowered to sign but was bound to sign bills of lading at any rate of freight which the charterers or their agents might direct, but "without prejudice to" that charter. These words introduce a difficulty. It is said that they limit the authority of the Captain to sign bills of lading which do not preserve to the owners the power to withdraw the ship under Condition 8 of the time charter and their lien on all goods under Condition 22. This construction is a possible construction, but it has long ago been rejected both by commercial men and by judicial decision.

There can be no doubt that the sub-charterer must, for this purpose, be regarded as an agent of the charterer. The words "without prejudice to this charter" mean that the rights of the shipowners against the time charterers, and *vice versa*, are to be preserved. That this is the true meaning and legal effect of the words "without prejudice to this charter" has often been the subject of controversy and of judicial decision, and has long been treated as settled by authority. In *Hansen v. Harrold Brothers*⁽¹⁾, Lord Esher said its meaning was "that it is a term of the contract between the charterers and the shipowners that, notwithstanding any engagements made by the bills of lading, that contract shall remain unaltered." It means no more. Condition 8 in the time charter, empowering the owners to withdraw the ship, cannot mean that, after the Captain has shipped goods for Bombay and given bills of lading for them to persons other than the time charterers, the owners can refuse to allow the ship

1904.

TURNER
v.
GOOLAM
MAROMED.

(1) (1894) 1 Q. B. 612; 63 L. J. Q. B. 744.

1904.

TURNER
v.
GOOLAM
MAHOMED.

to go to Bombay and deliver the goods there as agreed by the bills of lading. So as regards Condition 22 giving a lien upon all cargoes for freight or charter money due under that charter. This is a stipulation binding on the time charterer, and gives the shipowner a more extensive lien than he would have for freight payable in advance. But this clause does not override or limit the power of the Captain to issue bills of lading at different rates of freight, or entitle the shipowners to a lien on the goods of persons who have come under no contract with them conferring a lien for the freight payable under the time charter. A right to seize one person's goods for another person's debt must be clearly and distinctly conferred before a Court of Justice can be expected to recognize it.

If their Lordships had taken a different view of the legal effect of the bills of lading there might have been more difficulty in the case, for there is great force in Mr. Carver's argument that, if the bills of lading were mere receipts for goods put on board, the sub-charterer could have had no greater rights than those which the time charterers had themselves. It is not, however, necessary to solve the difficulties which would have arisen if there had been no bills of lading. For the reasons above stated, their Lordships are of opinion that the claim of the shipowners cannot be supported and that the order appealed from ought to be affirmed.

Their Lordships observe that the Court of appeal gave the shipowners the benefit of any lien which the time charterers had on the goods of the sub-charterer. This seems right and the sub-charterer's Counsel did not contend that it was not.

Their Lordships will therefore humbly advise His Majesty to dismiss the appeal and the appellants must pay the costs.

Appeal dismissed.

Solicitors for the Appellants: Messrs. *Maples, Teesdale & Co.*

Solicitors for the Respondent: Messrs. *Waltons, Johnson, Bull & Wharton.*

ORIGINAL CIVIL.

Before Mr. Justice Russell.

SONALUXMI (PLAINTIFF) v. VISHNUPRASAD HARIPRASAD
(DEFENDANT).*

1903.

December 14.

Brahmo-Samaj—Marriage—Polygamy—Act III of 1872, section 19.

A marriage performed in accordance with the rites of the Brahmo-Samaj is invalidated by the fact that either of the parties thereto has a husband or wife by a previous marriage alive.

THE main question to be decided in this suit was whether the defendant Vishnuprasad Hariprasad had lawfully married the plaintiff Sonaluxmi according to the rites of the Brahmo-Samaj faith, his wife Krishna by a previous marriage being alive.

Davar, Lowndes and Bahadurji appeared for the plaintiff.

Scott (Advocate General) and *Raike*s appeared for the defendant.

RUSSELL, J.:—It appears that the defendant is a member of a wealthy and, I believe, highly respectable family in Bhavnagar: and some years ago in 1894 he being a Wadnagara Nagar Brahmin made the acquaintance of the plaintiff Sonaluxmi, wife of one Dulab Ranchore, a Soni by caste. Sonaluxmi must have been a person of considerable personal attractions, and the defendant apparently made her acquaintance in the usual way through the intermediation of some servant, and in Bhavnagar illicit intercourse took place between the parties and lasted for a considerable time. It appears from the letters put in that the defendant, although a drunkard and a disreputable person, is a man of extremely religious opinions. Constant references are made in his letters to the intervention of God and Goddesses, and all his life is apparently directed by their guidance. Undoubtedly, the plaintiff and the defendant visited various places of pilgrimage when she was travelling with him.

There can be no doubt upon the evidence in the case that the *factum* of the defendant's going through a ceremony of marriage with the plaintiff is clearly proved. It is stated to have taken

* Suit No. 616 of 1903.

1903.

SONALUXMI

V.
VISHNU-
PRASAD.

place in the house of one Mr. Nagarkar. He is a member of a sect known as the "Brahmo-Samaj," and is an undergraduate of the Bombay University, a journalist, and a preacher of the Brahmo Samaj. He says that one Vanmali, a member of the Brahmo-Samaj, brought the plaintiff and the defendant to his house at Girgaon. Mr. Nagarkar says that he had two interviews with the parties, and that he asked them as to their faith: and that they answered that they were "theists," that is, believers in one God: and that they wanted to get married. At the second interview Mr. Nagarkar married them according to the Brahmo-Samaj rites. Mr. Nagarkar has produced a little book called "*The New Samhita*," containing the tenets of his sect. Mr. Nagarkar says in his evidence as follows:—

"I was not told that they were living together, nor was I told that the defendant had a wife living; had I known these facts I certainly would have refused to marry them."

I find in the Government of India Gazette of the 27th January, 1872, Mr. (afterwards Sir) Fitz-James Stephens, in moving that the report of the Select Committee on the bill to legalize marriages between certain Natives of India not professing the Christian religion be taken into consideration, gave an interesting account of the sect known as the Brahmo-Samajists. He says: "As your Lordship and the Council are aware there exists a religious body called the Brahmo-Samaj As regards marriage the difference between the two parties (Adi-Brahmos and Progressive Brahmos) appears to be this:—The marriage ceremonies adopted by the Progressive Brahmos depart more widely from the Hindu Law than those which are in use amongst the Adi-Brahmos. The Adi-Brahmos indeed contend that by Hindu Law their ceremonies though irregular would be valid. The Progressive Brahmos admit that by Hindu Law their marriages would be void. Moreover, the Progressive Brahmos are opposed both to infant marriage and to polygamy far more decisively than the conservative party"

Having regard to what is said in the above short history of this sect there can be no doubt that Mr. Nagarkar belonged to the sect called "Progressive Brahmos." There can be no question that the tenets of the Progressive Brahmos are in favour of

monogamy for the purpose of marriage. This is clear from the little book called "*The New Samhita*" referred to above which is put in in this case as containing the tenets of the Progressive Brahmos. I have read through the whole of the book. A great number of the tenets contained in it closely resemble the tenets of the present Christianity, although some of the tenets may sound somewhat old-fashioned, specially those with reference to masculine duties not being performed by women. But with regard to the ceremony of marriage the essentials necessary for a valid marriage according to the tenets of this sect are that "No man shall have more than one wife, and no woman shall have more than one husband:" and further, polygamy and polyandry are interdicted and strict monogamy is enjoined. It also appears from page 67 that this sect holds marriage to be more than a civil contract: it holds it to be a sacred and indissoluble tie.

We have now to see whether the plaintiff and the defendant were parties capable of going through the ceremony of marriage according to the tenets of the Brahmo-Samaj as represented by Mr. Nagarkar.

The defendant, after his illicit intercourse with the plaintiff had begun, travelled to various places with her: and her husband Dulab Ranchore gave her a release (or divorced her) in consideration of Rs. 1,100 paid by the defendant to him. Now it also appears that the defendant had at this time a lawfully married wife named Krishna living at the time he went through the ceremony of marriage with the plaintiff according to the rites of the Brahmo-Samaj church at Girgaon. The plaintiff was fully aware of her existence. It is not necessary for me to go into the question whether this marriage is valid or invalid according to the Hindu Law. The defendant is in a dilemma. He was married either according to the Hindu Law or Progressive Brahmo-Samaj. No suggestion is made that any Hindu ceremonies were performed. I hold that it was a marriage performed according to the rites of the Progressive Brahmo-Samaj sect. The defendant therefore being a married man was incapable of going through this ceremony, as, according to the form of ceremony and doctrine adopted by that sect, it was essential that the defendant ought

1903.

SONALUXMI

F.
VISHNU-
PRASAD.

1903.

SONALUXMI

v.
VISHNU-
PRASAD.

to have been a single man. It is, therefore, impossible for me to hold that this is a valid marriage according to law. I have carefully looked up a large number of reported cases to see if I could come across any marriages performed under similar circumstances where the form of marriage comes into consideration. The only case I have come across is that of *Lindo v. Belisario*.⁽¹⁾ That was a Jewish marriage, and it was held to be invalid because the forms of the Jewish religion were not carried out.

It is not necessary for me to decide the question which was raised whether a Bráhmín can marry a woman of low caste. I may say, however, that, having regard to the provisions of Act III of 1872, it does not at all seem settled that a Bráhmín cannot validly marry a person of another caste, although that caste is lower than his own.

Act III of 1872 deals with marriages between persons who do not profess the Christian, Jewish, Hindu, Mahomedan, Pársi, Buddhist, Sikh or Jain religion : and section 19 of that Act runs as follows :—"Nothing in this Act contained shall affect the validity of any marriage not solemnized under its provisions : nor shall this Act be deemed, directly or indirectly, to affect the validity of any mode of contracting marriage ; but if the validity of any such mode shall hereafter come into question, before any Court, such question shall be decided as if this Act had not been passed."

Further on in his speech referred to above Sir Fitz-James Stephens says that in cases of marriage where the parties are neither Christians, Jews, Hindus, Mahomedans, Pársis, Buddhists, Sikhs or Jains, the law of justice, equity and good conscience is to be observed. I mention this matter because I do not wish to be taken as deciding that under the present state of the law valid marriages may not be performed between Bráhmíns and members of lower castes, and, I think, it is probable that the Courts will hold such marriages valid and binding if validly performed.

Now, looking at the case before me, I find on the evidence that as a matter of fact the defendant in this instance intended to make the plaintiff his wife. First of all he went through a

(1) (1795) 1 Hág. Con. 216.

1903.

SONALUXMI
v.
VISHNU-
PRASAD.

marriage ceremony with her ; secondly, wrote a number of letters showing that he was treating her as his wife ; thirdly, she acquired the reputation of being his wife. Lastly, he performed a pilgrimage to Násik with her : while at Násik he went with her through a ceremony called "*potia-snan*." In this ceremony he bathed in the river with her having her *sári* wrapped around them both, and similarly he went through the ceremony again bathing in the river a second time with his *dhotar* wrapped around them both. This ceremony is gone through only by persons who are husband and wife. Therefore I find that the defendant did go through the marriage at the Brahmo-Samaj church intending to make the plaintiff his wife. But I hold that as defendant had at that time a wife married according to the Hindu Law alive, the marriage ceremony performed by Mr. Nagarkar between the defendant and plaintiff being contrary to the tenets of the Brahmo-Samaj is invalid according to law.

Attorneys for the plaintiff.—*Messrs. Tyabjee & Co.*

Attorneys for the defendants.—*Messrs. Mirza & Mirza.*

FULL BENCH.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Chandavarkar, Mr. Justice Batty and Mr. Justice Aston.

TUKARAM JAYARAM (ORIGINAL PLAINTIFF), APPELLANT, v. HARI VALAD SAKHARAM AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

1904.

April 3.

Mámlatdárs' Courts Act (Bom. Act III of 1876), sections 4, 15, 18 and 21⁽¹⁾ — Limitation Act (XV of 1877), Schedule II, Article 47—Possessory Suit in Mámlatdárs' Court—Rejection of plaint—Subsequent suit for possession on title in ordinary Court—Limitation.

A plaintiff suing in the ordinary Courts on his title for the possession of land is not bound by reason of anything in Article 47, Schedule II, of the Limitation

* Second Appeal No. 90 of 1903.

(1) Sections 4, 15, 18 and 21 of the Mámlatdárs' Courts Act (Bom. Act III of 1876).

4. Every Mámlatdár shall preside over a Court, which shall be called a Mámlatdár's Court, and which shall have power within such territorial limits as may from time to

1904.

TUKARAM
v.
HARI.

Act (XV of 1877), or section 21 of the Mámlatdárs' Courts Act (Bom. Act III of 1876) contained to bring his suit within three years from the previous rejection of his plaint by a Mámlatdár in a suit for the possession of that land.

As a suit on title is outside the Mámlatdár's jurisdiction, a mere rejection of a plaint by him cannot be treated as an order binding the plaintiff in reference to that which is the cause of action in a suit on title.

SECOND APPEAL from the decision of F. X. DeSouza, Acting District Judge of Khándesh, confirming the decree of V. V. Wagh, Subordinate Judge of Jalgaum.

The land in suit originally belonged to one Rangu, in respect of which he, in the year 1892, had brought a possessory suit

time be fixed by the Governor in Council to give immediate possession of lands, premises, trees, crops, or fisheries, or of any profits of the same, or to restore the use of water from wells, tanks, canals or water-courses to any person who shall have been dispossessed or deprived thereof otherwise than by due course of law, or who shall have become entitled to the possession or restoration thereof by reason of the determination of any tenancy, or other right of any other person in respect thereof.

The said Court shall also have power within the said limits, when any person is disturbed or obstructed or when an attempt has been made to disturb or obstruct any person, in the possession of any lands, premises, crops, trees, or fisheries, or in the use of water from any well, tank, canal or water-course, or of the use of roads or customary ways to fields, to issue an injunction to the person causing, or who has attempted to cause, such disturbance or obstruction, requiring him to refrain from causing or attempting to cause any such further disturbance or obstruction.

But no suit shall be entertained by a Mámlatdár's Court unless it be brought within six months from the date on which the cause of action arose.

The cause of action shall be deemed to have arisen on the date on which the dis-possession, deprivation, determination of tenancy or other right occurred; or on which the disturbance or obstruction, or the attempted disturbance or obstruction, first commenced.

15. On the day appointed the Mámlatdár shall proceed to hear all the evidence that is then and there before him, and to try the following issues, viz. :—

(a) If the plaintiff avers that he has been unlawfully dispossessed of any property or deprived of any use:

(1) Whether the plaintiff or any person on his behalf or through whom he claims was in possession or enjoyment of the property or use claimed up to any time within six months before the suit was filed?

(2) Whether the defendant is in possession at the time of the suit, and, if so, whether he obtained possession otherwise than by due course of law?

(b) If the plaintiff avers that he is entitled to possession of any property or restoration of any use by reason of the determination of any tenure or other right of the defendant in respect thereof:

(1) Whether the defendant is in possession of the property, or in the enjoyment of the use by a right derived from the plaintiff or from any person through whom he claims?

against the defendants in the Mámlatdár's Court. The Mámlatdár dismissed the suit and Rangu did not take any further steps under Article 47, Schedule II, of the Limitation Act (XV of 1877), to establish his title within three years after the dismissal of the suit. Subsequently, in the year 1899, Rangu sold the land to the plaintiff. He brought the present suit in the year 1900 to recover possession of the land, alleging that he was its absolute owner and was wrongfully dispossessed by the defendants.

The defendants contended that the suit was time-barred by reason of the Mámlatdár's order in the possessory suit. The Subordinate Judge allowed the defendants' contention and

1904.
TUKARAM
v.
HARI.

(2) Whether such right has determined at any time within six months before the suit was filed?

(c) If the plaintiff avers that he is still in possession of the property, or in the enjoyment of the use, but that the defendant disturbs or obstructs, or has attempted to disturb or obstruct, him in his possession or use:

(1) Whether the plaintiff or any person in his behalf is actually in possession or enjoyment of the property or use claimed?

(2) Whether the defendant is disturbing or obstructing, or has attempted to disturb or obstruct, him in such possession or enjoyment?

(3) Whether such disturbance or obstruction, or such attempted disturbance or obstruction, first commenced within six months before the suit was filed.

If the Mámlatdár's finding upon these issues be in favour of the plaintiff, he shall make such order as the circumstances of the case shall appear to him to require, provided that the same be not in excess of the powers vested in him by section 4.

If his finding be in favour of the defendant, he shall reject the plaint.

In either case the costs of the suit, including the costs of execution, shall follow the decree.

18. The party to whom the Mámlatdár shall give immediate possession, or restore a use, or in whose favour an injunction has been granted, shall continue in possession or use until ousted by a decree or order of a Civil Court:

Provided that nothing in this section shall prevent the party against whom the Mámlatdár's decision is passed from recovering by a suit in the Civil Court mesne profits for the time he may be kept out of possession of any property, or out of enjoyment of any use:

Provided, further, that in any subsequent suit or other proceeding in the ordinary Civil Courts between the same parties, or other persons claiming under them, the Mámlatdár's decision respecting the possession of any property, or the enjoyment of any use, shall not be held to be conclusive.

21. Any suit instituted by any person bound by any order made under this Act, or by any one claiming under such person, shall be dismissed, although limitation has not been set up as a defence, unless it has been instituted within three years from the date of the final order in the case. *

1904.
TUKARAM
v.
HARI.

dismissed the suit. He was of opinion that the Mámlatdár had heard and dismissed Rangu's suit and that no credence could be attached to the plaintiff's allegation, which was not proved, that the suit was compromised and, therefore, it resulted in dismissal.

On appeal by the defendant the Judge confirmed the decree, and in his Judgment he made the following observations :—

But Mr. Kotwal (plaintiff's Pleader) has argued that the suit was decided on a compromise and hence the bar of limitation would not apply. There is, however, not an *iota* of evidence that the suit was compromised except the bare statement of Rangu. This is, however, contradicted by the evidence of the defendant, Exhibit 19, as well as by the clear wording of the endorsement on Exhibit 43, which shows that the suit was decided after evidence had been recorded. But even if there had been a compromise, the bar of limitation would apply all the same as has been recently held by the Bombay High Court in the Ruling cited in Bombay Law Reporter, Vol. 2, page 680. Mr. Kotwal has also argued that no order was passed on the plaint by which the defendants' predecessor in title could be held to have been bound. I am unable to follow this argument. The plaint was dismissed under section 16 of the Act, and surely the order of dismissal was an order that bound him.

The plaintiff having preferred a second, appeal it was argued before a Division Bench composed of *Jenkins, C. J.*, and *Batty, J.*, who, on the 17th February, 1904, referred the question to a Full Bench and delivered the following referring Judgment :—

BATTY, J. :—In this case, instituted in 1900, the plaintiff seeks to recover possession of land in respect of which his vendor had, in 1892, brought a possessory suit under the Mámlatdárs' Courts Act, Bombay Act III of 1876. The plaint in that possessory suit was rejected and no suit to recover the property was brought within three years after the date of the order rejecting the plaint, either by the plaintiff therein or by any one claiming under him.

The lower Courts held that the present suit was barred by Article 47 of Schedule II of the Limitation Act, 1877, and relied on the decision in *Purushottam Dayaram v. Chatargir Guru Arjun-gir*⁽¹⁾ which purports to follow that in *Gulabbhai v. Kasanji*⁽²⁾ and that in *Ramchandra v. Bhikibai*⁽³⁾.

(1) (1900) 25 Bom. 82 ; 2 Bom. L. R. 680.

(2) (1897) P. J., p. 246.

(3) (1882) 6 Bom. 477.

We think there is good reason to doubt whether the cases above cited and others to similar effect were correctly decided and whether the plaintiff in a suit under the Mámlatdárs' Courts Act dismissed by an order containing no further direction, is a person bound by an order within the meaning of the Article 47 above mentioned.

We, therefore, refer to a Full Bench the following question, *viz.* :

Whether, when an order is passed rejecting a plaint or disallowing the claim of a plaintiff under the Mámlatdárs' Courts Act, Bombay Act III of 1876, and containing no direction as to possession, Article 47 of the second Schedule to the Limitation Act applies to a subsequent suit brought by the person who presented the (possessory) suit so rejected or disallowed, or by any one claiming under such person to recover the property which was the subject-matter of the plaint so rejected or claim disallowed.

The reference was heard by a Full Bench composed of *Jenkins, C. J., Chandavarkar, Batty and Aston, JJ.*

M. B. Chabul appeared for the appellant (plaintiff) :—The order passed by the Mámlatdár in the possessory suit was an order rejecting the plaint and nothing more. We submit that an order merely rejecting a plaint is not an order respecting possession within the meaning of Article 47, Schedule II, of the Limitation Act, nor is it an order falling under section 21 of the Mámlatdárs' Courts Act. The reason for enacting section 21 of the present Mámlatdárs' Courts Act was obviously not to include therein all orders whatsoever passed by a Mámlatdár in possessory suits. Under the former Acts Mámlatdárs had no jurisdiction to grant relief by issuing injunction. They were invested with jurisdiction to grant injunction by the present Act (Bom. Act III of 1876), and the wording of Article 46, Schedule II, of the former Limitation Act (IX of 1871) was not wide enough to include orders passed by Mámlatdárs under this new jurisdiction. Section 21 of the Mámlatdárs' Courts Act was, therefore, enacted to include within the operation of limitation such orders also.

The Legislature could not have intended that the longer period of limitation, namely, twelve years, should be curtailed by orders like the present which do not relate to the possession of property or the restoration of any use to any person, but which simply

1904.

TUKARAM

v.

HARL.

1904.

TUKARAM

v.
HARI.

reject a plaint. Such an order is not a final order contemplated both by section 21 of the Mámlatdárs' Courts Act and Article 47 of the Limitation Act. The words "comprised in such order" in Article 47 of the Limitation Act clearly show that the orders contemplated by them are those which, under the terms of the Mámlatdárs' Courts Act, the village officers have to carry out. When the order simply rejects a plaint and does nothing more, the village officers can have nothing to do with such order.

This interpretation, we submit, is more in accordance with the general principles of *res judicata* than the one contended for and apparently upheld in some cases.

Ráo Bahádur G. N. Nadakarni (with *G. G. Nadakarni*) appeared for the respondents (defendants):—The question referred to the Full Bench is concluded by several rulings of this Court. The present case is on all fours with *Annaji v. Daji*⁽¹⁾ wherein section 21 of the Mámlatdárs' Act was construed along with Article 47 of the Limitation Act and three years' limitation was held applicable. See also *Gulabbhai v. Kasanji*,⁽²⁾ *Chinto v. Vishnu Ganesh*⁽³⁾ which was followed in *Purushottam v. Chagtargir*⁽⁴⁾.

Our next contention is that section 4 of the Mámlatdárs' Act is the keystone of the Mámlatdár's jurisdiction. The third paragraph of that section lays down that a suit must be brought within six months from the date on which the cause of action arose. Section 5 of the Act mentions the particulars which are to be given in the plaint, and among those the date on which the cause of action arose is mentioned. If the plaint fails to disclose the fact that the cause of action arose within six months then the plaint is not admissible, and the Mámlatdár has no jurisdiction to hear the case. Section 11 lays down that if the plaint is admissible the Mámlatdár shall receive and file it and try the case. Section 9 enacts, *inter alia*, that the Mámlatdár shall reject the plaint if the cause of action arose more than six months before the plaint was presented. If there be no objection apparent on the face of the plaint for its admission then the Mámlatdár becomes seized of the case and orders passed sub-

(1) (1889) P. J., p. 161.

(2) (1897) P. J., p. 246.

(3) (1883) P. J., p. 131.

(4) (1900) 25 Bom. 82.

1901.

TUKARAM
v.
HANI.

sequently are final orders within the meaning of section 21 of the Act. There is a distinction between dismissal of a plaint on the ground of limitation apparent on the plaint and the dismissal on the ground of limitation determined after the hearing of the case has commenced.

Section 13 of the Mámlatdárs' Act provides that a plaint should be rejected with costs on plaintiff's default and that the case should be heard *ex parte* if the defendant fails to attend. Further, section 15 has prescribed certain sets of issues to be framed and decided with respect to certain cases. Therefore, if a Mámlatdár passes an order rejecting a plaint after he has applied his legal mind to the facts of a particular case and has decided against the plaintiff, the order evidently confirms the defendant in his possession.

[JENKINS, C. J.:—That may be the effect of the order but the Act does not say so.]

The Act does not say so, but the result of the order is the same as we contend for. When the plaintiff sues for recovery of possession, issues are framed with respect to possession and the order of the Mámlatdár must, therefore, necessarily be with respect to possession. Section 16 of the Act lays down that the order of the Mámlatdár must be endorsed on the plaint with reasons for the same. Therefore, so long as the Act stands unamended, three years' limitation must govern. The framing of the suit may be immaterial. The pleadings of the parties must be specially considered: *Shrinivas v. Hanmant*⁽¹⁾. It is the plaintiff who sets the law in motion and he must take the consequences of his act. To hold that an order rejecting a plaint is not an order respecting possession would be to inflict a very great hardship on the defendant as is apparent from the circumstances of the present case.

Section 18 of the Mámlatdárs' Act provides that a party in whose favour the Mámlatdár decides a case shall reap the fruit of that decision until ousted by a decree or order of a Civil Court. If the aggrieved party does not bring a suit to set aside the order of the Mámlatdár within three years as provided for by Article 47 of the Limitation Act, then section 21 of the

(1) (1899) 24 Bom. 260.

1904.

LUXARAM

v.
HARI.

Mámlatdárs' Act comes into operation, and that section imperatively lays down that the suit shall be dismissed although limitation has not been set up as a defence. The section makes no distinction between a plaintiff and a defendant.

Again, there is no hardship in applying three years' limitation to the plaintiff whose claim is rejected by the Mámlatdár after inquiry. Under the Civil Procedure Code, when the claim of a person to attach certain property is disallowed, he is bound by the same limitation of one year as the opponent when the latter's right is disallowed.

JENKINS, C. J. :—I would answer the reference by saying that a plaintiff suing in the ordinary Courts on his title for the possession of land is not bound by reason of anything in Article 47 of the Limitation Act or section 21 of the Mámlatdárs' Act contained to bring his suit within three years from the previous rejection of his plaint by a Mámlatdár in a suit for the possession of that land. My learned colleagues agree with this conclusion, which is limited to meet the actual circumstances of the case out of which the reference arises. I have had an opportunity of reading their Judgments which state at length the reasons justifying this conclusion, and it would serve no useful purpose for me to make a separate statement of those reasons. It will suffice for me to say that as a suit on title is outside the Mámlatdár's jurisdiction, it is (in my opinion) impossible to hold that a mere rejection of a plaint by him can be treated as an order binding the plaintiff in reference to that which is the cause of action in a suit on title.

Therefore I think the plaintiff cannot for the purposes of the civil suit, be held to be bound by the order under the Mámlatdárs' Act.

CHANDAVARKAR, J. :—The question is—What is "an order respecting the possession of property" under the Mámlatdárs' Act, to which Article 47 of the Limitation Act was intended to apply? That Article must be read with section 21 of the Mámlatdárs' Act, and, when so read, the answer to the question depends upon what is an order under the Mámlatdárs' Act "by which any person is bound" within the meaning of the Act. Generally

1904.

TUKARAM

v.

HARI.

speaking, apart from the Act, all orders of a Court may be said to be more or less binding *inter partes*. But there is a special sense in which, according to the Act, an order under it is binding between the parties, *i.e.*, in the sense that the effect given to it by the Mámlatdár in the exercise of his jurisdiction is binding till it is superseded by a decree or order of a Civil Court. All orders by which a Mámlatdár gives immediate possession to a party or restores a use to him or issues an injunction in his favour have a binding effect in this special sense of the term "bound by an order" according to section 18 of the Act. And the last proviso to that section shows that by the Mámlatdár's decision "respecting the possession of any property" was meant only that decision which is referred to in the first paragraph of the section.

The intention of the Legislature to restrict the term "bound by an order" to only those orders which are dealt with in the first paragraph of section 18 and to no others appears clearly from the following considerations. The orders which a Mámlatdár can pass on the question of possession may, having regard to the different sections of the Act, be divided into the following classes :—(1) orders restoring possession to a plaintiff who has been dispossessed otherwise than by due course of law within six months before suit, or, where a plaintiff's possession has been obstructed by a defendant within that period, orders issuing an injunction to the defendant and thereby confirming the plaintiff in possession; (2) orders rejecting the plaint for default; and (3) orders rejecting the plaint on the ground that the plaintiff has failed to prove all or any of the issues laid down in section 15, clauses (a), (b) and (c).

As to the first class there can be no doubt, and it is not disputed at the Bar, that they are orders respecting possession. According to section 4 of the Act, which lays down the extent and purpose of the Mámlatdár's jurisdiction, he has power to restore possession to a party who has been illegally dispossessed or to confirm a party in possession whose possession has been illegally disturbed or obstructed, provided such dispossession or disturbance or obstruction has taken place within six months immediately before the date of the suit. The issues laid down in section 15, clauses (a), (b) and (c), of the Act, are framed with

1904.

TUKARAM

v.

HART.

reference to the extent and purpose of the special jurisdiction created by section 4; and section 18 says that where a party is either restored to possession or confirmed in possession by means of an injunction, by the Mámlatdár, such party shall continue in possession until ousted by a decree or order of a Civil Court. This latter section has reference only to the first class of these orders, *i.e.*, to a plaintiff who, having been dispossessed, is restored by the Mámlatdár to immediate possession or who, having been obstructed while in possession, has the obstruction removed by an injunction of the Mámlatdár and is maintained in possession. A party dissatisfied with such orders, says section 18, must go to a Civil Court if he wishes to dispossess the party who has succeeded in the Mámlatdár's Court by being either restored to or confirmed in possession. In other words, the obligation is cast by the Act upon a party who has been dispossessed or whose obstruction has been removed by the Mámlatdár to bring a suit in a Civil Court if he desires to get back the possession or justify the obstruction. Such an order then is an order by which a person, to whose prejudice it is, is bound until he gets it superseded by a Civil Court. The 2nd proviso to section 18 makes it clearer still that it is an order of this kind only which, according to the Act, falls within the category of "the Mámlatdár's decision respecting the possession of any property."

It is significant that while the Act in express terms imposes the obligation of suing in a Civil Court on a party against whom there is an order either restoring possession to or confirming possession in his adverse party, there is no section in the Act which either expressly or by necessary implication imposes a similar obligation on a party who has against him an order of either the second or the third class mentioned above. Had the Legislature intended to treat all orders alike, whether falling under the first, second or the third class, as in fact orders respecting possession and, therefore, binding until superseded by a Civil Court's decree or order, they would have and should have worded section 18 accordingly. In that case section 18 would have run as follows:—

"The party to whom the Mámlatdár shall give immediate possession or restore a use, or in whose favour an injunction has

been granted, or in whose favour any other order is passed by the Mámlatdár, shall continue in possession or use or shall have the benefit of the order in his favour as the case may be until the Mámlatdár's order is superseded by a decree or order of a Civil Court."

The omission, then, from section 18 of orders other than those belonging to the first class shows that the Legislature intended a sharp distinction between orders falling under the first class on the one hand and those of the second and the third class on the other in point of a binding effect as regards the important question of their supersession by a Civil Court. Orders, therefore, to which section 18 relates are the only orders by which parties are under the Act bound until a Civil Court's decree or order comes in and upsets their effect. It follows from that intention of the Legislature that the three years' limitation prescribed by section 21 of the Mámlatdárs' Act and Article 47 of the Limitation Act was prescribed for suits of the kind referred to in section 18 of the former Act as suits relating to orders respecting possession.

Orders other than these may, no doubt, in one sense, be spoken of as orders respecting possession, in the sense, that is, that the Mámlatdár disallows a claim to possession by such order. But if we are to read Article 47 of the Limitation Act with section 21 of the Mámlatdárs' Act, as I think they should be read, two conditions are necessary for the application of the three years' limitation:—(1) that the party suing should be bound by the order under the Mámlatdárs' Act and (2) that the order should be respecting possession. And section 18 of the Act explicitly points out the orders to which these two conditions apply. They must belong to the first of the three classes above mentioned. It follows from this that the Legislature could not have intended to prescribe the three years' period of limitation, which is shorter than the ordinary period, for orders belonging to the 2nd or the 3rd class without giving them a binding effect in the same terms as in section 18, *i.e.*, by imposing upon the party against whom such orders are passed the obligation of going to a Civil Court. If one class of orders respecting possession has been treated by the Legislature in express terms in section 18 of the Mámlatdárs'

1904.

TUKARAM-

v.
HARL.

1904.

TSKARAM
v.
HABL.

Act as binding until superseded by a Civil Court's decree or order and nothing is said about the other classes, on the principle of *expressio unius est exclusio alterius* we must infer that these other classes of orders were intended by the Legislature to be excluded as carrying no similar binding effect but as falling within the ordinary period of limitation prescribed for suits.

The result, therefore, in my opinion, is that for the purposes of the three years' limitation applicable to a regular suit in a Civil Court a party is bound by only that order of the Mámlatdár which restores his adverse party to possession or confirms the latter in possession by means of an injunction. This view is in accordance with the interpretation of section 18 in *Bapu v. Mahadaji*⁽¹⁾. Moreover, it gives coherent and consistent effect to the extent and purpose of the Mámlatdár's jurisdiction as laid down in specific terms in section 4 of the Act. According to it the jurisdiction is of a limited and special character, with the conditions of it distinctly defined. It is only where those conditions are fulfilled that the Mámlatdár's jurisdiction arises, not otherwise. As observed by the Privy Council in *Nusserwanjee Pestonjee v. Meer Mynooddeen Khan*⁽²⁾ "wherever jurisdiction is given to a Court by an Act of Parliament, or by a Regulation in India (which has the same effect as an Act of Parliament) and such jurisdiction is only given upon certain specified terms contained in the Regulation itself, it is a universal principle that these terms must be complied with in order to create and raise the jurisdiction, for if they be not complied with, the jurisdiction does not arise." Applying this principle to the Mámlatdárs' Act, jurisdiction is given on certain terms to the Mámlatdár to restore a plaintiff to possession or to confirm him in possession, those terms being that the plaintiff in the former case should be, *first*, dispossessed otherwise than by due course of law; *secondly*, that the dispossession should be by the defendant; and, *thirdly*, that the dispossession should be within six months before the date of the suit; and that the plaintiff, in the latter case, should be, *first*, himself in possession; *secondly*, that he should be obstructed by the defendant; and, *thirdly*, that the obstruction should be within six months before the date of the suit. Where these

(1) (1898) 18 Bom. 348.

(2) (1855) 6 Moo. I. A. 134 at p. 155.

1901.

C.
HAB.

terms are complied with, the special power vested in the Mám-latdár comes into operation—that power being to restore the plaintiff to possession in the former case, to confirm him in possession in the latter by issuing an injunction. Where the requirements or terms are not complied with, the power does not arise. All orders passed by the Mám-latdár, whether they be orders allowing the plaintiff to be withdrawn or rejecting the plaintiff for default, or allowing or disallowing the claim, may be binding so far that they cannot be questioned by another suit in the Mám-latdár's Court upon the same cause of action. But it is a different question whether they are binding so far as the obligation imposed upon a party to get them superseded by a Civil Court's decree is concerned. In respect of such an obligation the Act has a specific provision (section 18) as to orders passed by the Mám-latdár exercising and giving effect to the power vested in him by the terms of section 4 of the Act. The omission of the Legislature to give a similar obligatory effect to other orders and their exclusion from section 18 could only be due to the fact that those are orders to which no effect can be given by the Mám-latdár, because they do not fall within the terms of his power or jurisdiction defined in clear terms by section 4.

The decision in *Chinto v. Vishnu*⁽¹⁾, which has been followed in this Court till now, proceeds upon what is a pure assumption, which is that when a Mám-latdár passes an order rejecting a plaintiff's claim, such order maintains the defendant in possession. There is no warrant whatever in any of the provisions of the Act for this assumption. The Mám-latdár maintains a party in possession only when he issues an injunction in favour of that party restraining his adverse party from obstructing (see section 18). If an order of the Mám-latdár rejecting a plaintiff or disallowing a claim were to be treated as having the effect of maintaining the defendant in possession, we should be improving upon, by adding words to, section 18 and further we should be imputing to the Legislature the absurdity of having intended that even where a Mám-latdár rejects a claim on the ground that the defendant in his opinion and according to his finding is not in

(1) (1888) P. J., p. 131.

1904.

TUKARAM
v.
HARI.

possession, the Mámlatdár's decision must be nevertheless treated as proceeding upon a contrary finding and that his order must be interpreted as confirming the defendant in a possession which, the Mámlatdár has expressly found, the defendant has not.

For these reasons my answer to the reference is the same as that given by the learned Chief Justice.

BATTY, J. :—The question formulated in the order of reference does not specifically mention section 21 of the Mámlatdárs' Courts Act (Bombay Act III of 1876). But it seems necessary to consider the applicability of that section in this case, and arguments on that point have been addressed to us.

The wording of that section is somewhat wider than that of Art. 47 of Schedule II of the Limitation Act, 1877, and as suggested in argument, was probably intended to include suits by persons bound by orders restoring uses or taking the form of injunctions, as well as by orders respecting possession only.

Both the article and the section in question in defining the suits to which they apply require that suits should be suits brought by persons bound by an order. The section (21 of Bombay Act III of 1876) contains indeed no further definition. It cannot be supposed that it was intended to cover suits of every description, and the definition must be construed as limited to suits by persons suing only in the character of persons bound by an order, and in no other character, and on no other ground whatsoever. The phrase is ambiguous must be construed liberally, *i.e.*, in favour of the right to proceed: *Umiashankar Lakhmiram v. Chhotatal Vajeram*⁽¹⁾. The defining phrase cannot, I therefore think, be extended by implication to a suit brought by a person whose plaint or claim under the Mámlatdárs' Courts Act has been rejected or disallowed. It is true that section 16 of the Bombay Act refers to orders "for rejecting a plaint or disallowing a claim." But orders for such purposes impose no obligation on the plaintiff to do or to abstain from doing anything. They amount at most to a refusal to pass any order binding on any person. They may include orders based on want of jurisdiction, or on proof that the plaintiff's possession has never been disturbed by the defendant. In no such case is there

(1) (1875) 1 Bom. 19.

anything to enforce, and the Act gives no further effect or operation to such orders. The jurisdiction ceases with the decision dismissing the suit? *Ganesh Nath v. Gaupat*⁽¹⁾. It is contended for the respondent that the dismissal of a suit by the Mámlatdár confirms the defendant in possession. And this was apparently held in *Chinto v. Vishnu*⁽²⁾. But a dismissal may, as above indicated, proceed on the ground that the defendant is not in possession. The respondent is thus driven to the assumption that the plaintiff may be bound by the *decision* or *finding* of the Mámlatdár, though not by his order. This is opposed to the distinct provision in section 18 of the Act that the Mámlatdár's decision respecting the possession of any property shall not be held to be conclusive: *Basapa v. Lakshmapa*⁽³⁾, *Mudkapa v. Ningapa*⁽⁴⁾, and *Ramchandra v. Narsinhacharya*⁽⁵⁾. Neither section 21 of the Mámlatdárs' Courts Act nor Article 47 of the 2nd Schedule to the Limitation Act attaches any effect to a bare decision by a Mámlatdár. There is no provision corresponding to section 13 of the Code of Civil Procedure which would make the decision of the Mámlatdár operative as *res judicata*. The Mámlatdárs' Courts Act gives the Mámlatdár no power to decide upon the *rights* of the parties, and the order rejecting a suit or disallowing a claim involves no decision as to the *right* of the plaintiff to possession. His rights are strictly unaffected thereby, and therefore a decision rejecting a plaint in no sense confirms the defendant in possession.

The Article 47 of the Limitation Act and section 21 of the Bombay Mámlatdárs' Act relate only to orders which are binding, that is to say, which are enforceable. The Article of the Limitation Act further specifies that the suits to be barred must be suits to recover possession of property comprised in the order whereby the plaintiff is bound. But a specification of the property claimed is no essential part of an order dismissing a suit under the Mámlatdárs' Courts Act.

For the above reasons I concur in the answer given by the learned Chief Justice.

(1) (1895) P. J., p. 56.

(2) (1883) P. J., p. 131.

(3) (1877) P. J., p. 58.

(4) (1877) P. J., p. 115.

(5) (1899) 24 Bom. 251; 1 Bom. L. R. 630.

1901.

TUKARAM

v.
HARI.

1904.

TUKARAM
v.
HARI.

ASTON, J.:—I concur with the judgment of the learned Chief Justice. In my opinion the reference should be answered as there stated, for the reasons given.

It is unnecessary, therefore, to discuss the question whether a plaintiff, whose claim to recover possession of property after alleged unlawful dispossession has been rejected or disallowed in a Mámlatdár's Court, is in a better position as regards limitation if he subsequently sues in the regular Civil Court on the same bare possessory right than if he had not sued unsuccessfully in the Mámlatdár's Court.

ORIGINAL CIVIL.

*Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Batty.*

1904.

April 15.

SIR E. SASSOON AND OTHERS (PLAINTIFFS), APPELLANTS, v. TOKERSEY
JADHAWJEE (DEFENDANTS), RESPONDENTS.*

Contract Act (IX of 1872), section 30—Wagering Contracts.

In order that a transaction may fall within section 30 of the Indian Contract Act, there must be at least two parties, the agreement between whom must be by way of wager, and both sides must be parties to the wager.

It is of the essence of a wager that each side should stand to win or lose, according to the uncertain or unascertained event, in reference to which the chance or risk is taken ; in other words, to make an agreement a wager there must be a common intention to bet.

THE plaintiffs filed two suits against two firms, one carrying on business in the name of Tokersey Jadhawji and the other in the name of Motiram Jadhawji. Substantially both firms did the same kind of business and in the present case one suit would have been filed but for the fact that in the former firm there were two partners who were not connected with the latter firm.

The plaintiffs' business with the defendants consisted mainly of dealings in American cotton, and these two suits were brought in respect of deficiencies arising on the resale of certain American cotton purchased by the plaintiffs on behalf of the two firms and

* Suit No. 695 of 1901; Appeal No. 1281.

not taken delivery of by them and resold by the plaintiffs on their behalf.

The evidence in the two suits being identical, both suits came on together and were tried as one before Mr. Justice Tyabji, who delivered one judgment. By their written statement the defendants denied their liability to the plaintiffs and without prejudice to their other defences set up the plea that the dealings in question were gambling and wagering transactions and that, therefore, in any event the defendants were not liable for the sums claimed in these suits. The defendants also prayed for the return of a title deed deposited by them by way of equitable mortgage with the plaintiffs which the defendants alleged had been deposited in consideration of the plaintiffs waiving their right to call for deposits by way of margin in case the cotton market was to any extent depreciated. The plaintiffs alleged that the said security was deposited by way of collateral security against the separate indebtedness and liabilities of the defendants in respect of their separate transactions and claimed a charge on the property to which the title deed referred.

At the hearing the following issues were raised :—

1. Whether the plaintiffs duly executed the instruction of the defendants and made agreements for the purchase of cotton as requested by the defendants?
2. Whether, if so, the said agreements were contracts or agreements by way of gaming and wagering?
3. Whether the title deed in the plaint mentioned was not deposited on the terms set out in the written statement?
4. Whether having regard to the said deposit the plaintiffs were entitled to make the sale on the defendants' account as alleged in the plaint?
5. Whether the plaintiffs are entitled to the relief prayed or any part thereof as against the immovable property in the plaint mentioned?
6. Whether the defendants are entitled to recover the title deed as prayed in their written statement?

Mr. Justice Tyabji found issues 1, 2, 4 and 6 in the affirmative and issues 3 and 5 in the negative. Issues 3 and 4 were abandoned by the defendants. The suit was dismissed with costs in both cases. Against this decision the plaintiffs appealed.

1904.

SASSOON
v.
TOKERSEY.

1901.
SASSOON
v.
TOKERSEY.

Scott (Advocate General), *Kirkpatrick* and *Inverarity*, for the appellants.

Lowndes and *Jardine*, for the respondents.

JENKINS, C. J.:—The original plaintiffs to suit No. 695 of 1901 were the members of the firm of Messrs. David Sassoon and Co., who carried on business in partnership as Merchants and Bankers at Bombay, Liverpool, and elsewhere. David Sassoon and Company, Limited, to whom the firm subsequently transferred their business, including the claim sought to be recovered in this suit, have since been added as plaintiffs.

The defendants are Tokersey Jadhawji, Motiram Jadhawji, Purshotam Umersey, and Bhagchand Kanji, members of the firm of Tokersey Jadhawji, trading in partnership as merchants, and Mr. Macleod, the Official Assignee of the estate and effects of Motiram Jadhawji, one of the members of Tokersey Jadhawji. The plaintiffs to the companion suit No. 696 of 1901 are the same and the defendants are Motiram Jadhawji and Tokersey Jadhawji, trading in partnership under the style of Motiram Jadhawji.

The two suits arise out of transactions initiated by instructions to David Sassoon and Co. to purchase American cotton as follows: on the 15th March, 1901, instructions were given by Motiram Jadhawji to purchase 400 bales, and by Tokersey Jadhawji to purchase 100 bales for delivery in July-August; on the 26th March instructions were given by Motiram Jadhawji to purchase 500 bales for delivery in August-September; and on 23rd April instructions were given by Motiram Jadhawji to purchase 1,500 bales and by Tokersey Jadhawji to purchase 500 bales for delivery in August.

The course of dealing throughout has been the same in respect of each order, and it will suffice to state the history of one of these transactions, as that will describe what was done in the others.

On the 15th of March, 1901, the Bombay Branch of David Sassoon and Co. cabled their London Branch to buy 500 bales of American cotton July-August delivery. This was done in pursuance of instructions from Motiram Jadhawji to buy 400

bales, and from Tokersey Jadhawji to buy 100 bales for July-August delivery.

On the same date Tokersey Jadhawji addressed to Messrs. David Sassoon and Co. the following letter :

1901.
SASSOON
&
TOKERSEY.

DEAR SIRS,

I beg to confirm the instructions to you this day by your Bombay firm on my account to purchase 100 bales of American cotton July-August delivery at market rate and I shall telegraph to you again when I wish the cotton sold. In the event of its not being previously disposed of, I hereby agree to your selling the cotton at the best price obtainable on its being tendered for delivery so that you may not have to take it up. I also agree to pay the customary charges thereon and one and a half per cent. commission on the sale amount. In the event of prices declining, I agree to deposit with you a sufficient amount to cover the deficiency in price. Should I not do so, you may sell the cotton at market rate.

(Sd.) TOKERSEY JADHAWJI.

Thereupon Messrs. David Sassoon and Co. purchased from Messrs. Corrie MacColl and Co. 500 American bales to be delivered in Liverpool during July-August, 1901.

The terms of the transaction are set out in a letter of the 15th March, 1901, Ex: $\frac{S. J. B.}{2}$, which is in these terms :

DEAR SIRS,

We have this day sold to you 236,000 lbs. American cotton net weight to be contained in five hundred American bales more or less to be delivered in Liverpool during July-August 1901 on the basis—

400 four pence fifty-five and a half sixty-fourths	...	455½
100 four pence fifty-six sixty-fourths	...	456

With customary brokerage to us for Middling on the terms of the printed Rules of the Liverpool Cotton Association, Limited, as endorsed and subject to Clearing House Regulations and the Arbitration Bye-laws of the Association.

The cotton to be taken with mutual allowances to be settled by arbitration, but any lot below Low Middling may be returned by the buyer under the provisions of Rule 7.

Each 47,200 lbs. to be treated as a separate contract if required.

(Sd.) CORRIE MACCOLL & Co.

Messrs. Corrie MacColl on the same day purchased from Moon Bower and Co. 400 and 100 bales for the same delivery.

The terms are set forth in Ex: $\frac{R. T.}{1}$, which runs as follows:

1904.
SASSOON
v.
TOKERSEY.

DEAR SIRs,

We have this day sold to you the following American Cotton Futures as per As. 3, Contract Form of the Liverpool Cotton Association, Limited, and subject to its rules and regulations :—

Quantity.	Position.	Price per lb.
400	July-August, 1901.	4.55½
100	" "	4.56

MOON BOWER & Co.

At the end of April there was a fall in prices, and this continued with the result that Messrs. David Sassoon and Co. pressed the Bombay purchasers to deposit a sufficient amount to cover the deficiency in price. Accordingly on the 13th of May, 1901, there was deposited with the plaintiff firm by way of equitable mortgage a title deed to cover this deficiency, and on the 26th of July a sum of Rs. 7,000 was deposited as further security.

On the 8th of August, 1901, the plaintiff firm wrote to Tokersey Jadhawji as follows :—

DEAR SIR,

Owing to the continued heavy decline in American cotton please take note that unless you send us a further deposit of Rs. 5,000 by 1 o'clock to-morrow (Friday) we shall wire instructions to London to sell off your open contracts with us.

Begging immediate attention.

P. pro DAVID SASSOON & Co.,
(Sd.) HENRY SOLOMON.

On the 9th of August, 1901, a telegram was sent by the plaintiffs' Bombay Branch to their London Branch to sell all the cotton purchased under the orders to which I have referred, and on that same day the sale was effected. This sale resulted in a loss, and in respect of the transaction to which suit No. 695 of 1901 relates, the plaintiffs, after giving the defendants credit for certain amounts, claim by this suit Rs. 7,600 and interest.

To this claim the plea has been set up that the transactions were gambling and wagering transactions.

The suit came on for hearing before Tyabji, J., and the following issues were raised : 1. Whether the plaintiffs duly executed the instructions of the defendants and made agreements

for the purchase of cotton as requested by the defendants?
2. Whether, if so, the said agreements were contracts or agreements by way of gaming and wagering?

On both these issues the learned Judge found in the affirmative and he accordingly dismissed the suit. From this decree the present appeal is preferred, and the sole question argued before us has been whether the transactions were by way of wager or not.

In cases of this description there is a danger of confounding speculation, or that which is popularly described as gambling, with agreements by way of wager; but the distinction in the legal result is vital.

The Indian Contract Act in section 30 provides that agreements by way of wager are void; but that a transaction may fall within this provision of the law there must be at least two parties, the agreement between them must be by way of wager, and both sides must be parties to that wager.

Now it is of the essence of a wager that each side should stand to win or lose according to the uncertain or unascertained event in reference to which the chance or risk is taken.

In *Hampden v. Walsh*⁽¹⁾ a wager was described as a contract by A to pay money to B on the happening of a given event in consideration of B paying money to him on the event not happening, while in *Carlill v. Carbolic Smoke Ball Company*⁽²⁾ a more elaborate definition is formulated by the present Lord Brampton on the same lines. The first question then that we must ask ourselves is at what stage of the transaction does this alleged agreement by way of wager come in.

The frame of the issues I have read suggests that it was the agreements made by the plaintiffs in England that were by way of wager, and with this suggestion I will first deal.

Now one of the agreements in England is evidenced by the delivery contract of the 15th March, 1901, Ex. S. J. B.₂, which I have read, and which may be taken as typical of all the delivery contracts connected with the transactions in suit.

(1) (1876) 1 Q. B. D. 189 at p. 192.

(2) (1892) 2 Q. B. 484 at p. 490.

1904.

SASSOON
v.
TOKERSEY.

It will be noticed that it incorporates the printed rules of the Liverpool Cotton Association, Limited, and it has not been suggested before us in argument that those rules as they stand point to an agreement by way of wager.

At the same time the evidence all points the other way. Thus it has been sworn that the contract is in the ordinary form, that under such a contract delivery is ordinarily demanded and given, that the purchases made in March and April were ordinary purchases for future delivery, and that they were made under contracts in the ordinary form for future delivery, in the form in which cotton is ordinarily bought and sold for future delivery, and in the form in which delivery is demanded and given. This evidence has not been impugned and I think we should accept it as trustworthy.

But then it is argued that, when the facts are investigated, it becomes obvious that, notwithstanding the terms in which the agreements are expressed, the transactions in suit were by way of wager, and what is relied on for this purpose is the fact that under them no delivery was made, and that David Sassoon and Co. practically never do take delivery.

Under the contracts which come in question in this suit it is true no delivery was made, but then the cotton was sold by reason of the defendants' failure to deposit cover for the deficiency in price, and it is instructive to observe the defendants' attitude in this matter as disclosed by the correspondence.

On the 8th of August, 1901, Sassoons wrote to Tokersey Jadhawji that unless a further deposit was sent by 10 o'clock the next day they would wire instructions to London to sell off the open contracts.

On the 10th of August Tokersey Jadhawji writes as follows:—

DEAR SIRS,

I am in receipt of your Memo. of this day informing me of the sale of 600 bales of cotton purchased on our account through you and am very much surprised at it. Please note that I do not accept the validity of the sale which I dispute.

(Sd.) TOKERSEY JADHAWJI.

A letter in the like terms was on the same day sent by Motiram Jadhawji. Though there was no delivery under these agreements, it is proved that in respect of earlier transactions which

matured in April, May and June, tenders were made in six instances (see Ex. $\frac{S. J. B.}{83}$).

None of these tenders were accepted, the cotton being sold in accordance with the terms of the original letter of instructions, and it is suggested that these tenders were mere blinds, made with a view to give the transactions an appearance that did not really belong to them. This suggestion however rests on no basis, and I can see no reason on the record for a conclusion that those who tendered to Messrs. Sassoons acted otherwise than in good faith.

Dealing in American futures may be speculative, but there is no evidence in this case that would justify us in holding that they are necessarily agreements by way of wager.

Mr. Comber in his cross-examination says :

"There is at times a lot of speculation going on in the market. I should think 90 per cent. of the whole business would be *bond fide* and 10 per cent. would be speculative. I am speaking of American futures. I mean 90 per cent. is bought and sold either with the intention of delivery or as cover on some transaction. When we buy cotton as cover it is no intention on part of the purchaser that he will take delivery. If under exceptional circumstances he changed his mind and wanted delivery he would get it. When I say he can always get delivery that is supposing he is dealing with a sound man. That rests on that (*sic*) if my seller is solvent he can always get delivery except in covers; in American futures. As a rule there is an enormous deal. More American cotton is sold than is grown and a great deal more is sold in Liverpool than comes here. I can't give statistics. So if in any one month all the people who had purchased ahead for delivery in that month were not to resell and were to ask for delivery, they could not get it because there would not be enough cotton to go round. Of 90 per cent. *bond fide* delivery about $\frac{1}{2}$ are covering purchases and $\frac{1}{2}$ would be purchases for delivery. All what I have said about covering purchases relates to my constituents' business as well as mine. I make the covering purchases for constituents. I make them to order, but I don't know whether they are covering purchases or not."

It has been argued before us that purchases for cover cannot be treated as *bond fide* business and a doubt has been suggested as to how far, therefore, Mr. Comber's evidence can be relied on. But it is easy to see why Mr. Comber as a business man so classes purchases for cover. The sympathetic movement of the prices of cotton of different classes is a matter of common knowledge, and, as the phrase a "purchase for cover" implies, it

1904.

SASSOON

TOKERSEY.

1904.
SASSOON
v.
TOKERSEY.

would not in business be regarded as an unrelated transaction, but as a legitimate means of diminishing risks.

How far this view would meet with approval in a Court of law we need not now enquire, as I see no reason for not accepting Mr. Comber's statement that delivery to a very considerable extent takes place under contracts incorporating the rules of the Liverpool Cotton Association.

In the face of this evidence, which stands uncontradicted, it would be impossible to hold that no *bond fide* business is done under contracts framed as those now in question are, and we have no sufficient materials for holding that in this particular instance the contracts into which Messrs. Sassoons entered on the defendants' instructions were agreements by way of wager, that is to say, that they were agreements simply for differences without any intention on either side to deliver.

The sole circumstance on which the defendants rely, the absence of any proof that Sassoons ever take delivery, may be relevant to their intention, but we have nothing in the facts of this case that would entitle us to infer therefrom an intention on the part of their vendors only to wager, and, as I have already pointed out, to make an agreement a wager there must be a common intention to bet.

Then it has been contended that, even if the English contracts were not by way of wager, still the agreements between Sassoons and the defendants were.

But this disregards the express terms of the contract and the essential element of a wager. Under the contract Sassoons were merely Commission agents, entitled as such to their proper remuneration and to reimbursement of expenses, but they took no risks: the only risk that was suggested before us was that which might be the sequel of supervening insolvency, but obviously that is not a risk which converts an otherwise legitimate contract into a wager, and I can find nothing which supports the view that the contract between the parties was not in accordance with the document.

There is an argument advanced by the learned Judge, which I may here conveniently notice: he would impale the plaintiffs on the horns of a dilemma: for he says in effect that the English

1904.

SASSOON
v.
TOKERSEY.

contracts were wagers or they were not: if they were wagers, then the plaintiffs obviously are not entitled to recover; if they were not, the result will be the same, since then they would have failed to comply with the authority under which they purported to act.

But in my opinion the second of these horns will not stand the strain to which it is put. The instructions, in my opinion, were not an authority only to enter into wagering contracts: it cannot be, and in fact before us has not been, suggested that the contracts actually made were not in accordance with the instructions, and we have already held they were not agreements by way of wager. The defect of the learned Judge's argument will on analysis be found to be that he has failed to distinguish the rights created by the contracts from the mode in which those rights may subsequently have been dealt with.

So far I have dealt with the case on the basis of section 30 of the Contract Act, but from my conclusions it equally follows that Bombay Act III of 1865 affords no defence to this suit, for in the view I take neither the contracts of Sassoons with the defendants nor the English contracts are agreements by way of wager, and so there is no foundation for the application of bar created by the Bombay Act. There must, therefore, be a personal decree for the amount claimed with interest and also the usual mortgage decree in respect of the deposit of title deeds by way of equitable mortgage.

There will be a similar decree in the second suit, save that in place of a direction for sale of the mortgaged property there will be liberty to apply in the first suit for the application of the surplus proceeds of the sale therein decreed. The plaintiffs must in each suit receive their costs throughout from the defendants therein and will be at liberty to add the same to their security.

Decree reversed.

Solicitors for the Appellants: *Messrs. Crawford, Brown & Co.*

Solicitors for the Respondents: *Messrs. Payne & Co.*

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Aston.

1904.
June 7.

GOPILAL MANILAL, APPLICANT, *v.* AGARSINGJI RAISINGJI
AND ANOTHER, OPPONENTS.*

Minor—Guardian ad litem—Nazir—Court's power to relieve.

There is nothing that compels the Court to retain as guardian *ad litem* of a minor one of its officers, where the circumstances of the case make it clear that the interests of the minor will be thereby imperilled. The Court has power to relieve the Nazir of his position as guardian when the Nazir has no funds for the purpose of conducting adequately the defence of the minor.

Narajandas Ramdas v. Saheb Husein⁽¹⁾ referred to.

APPLICATION under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) against the order of Chandulal Mathuradas, First Class Subordinate Judge of Ahmedabad.

The plaintiff Agarsingji Raisingji brought a suit in the Court of the First Class Subordinate Judge of Ahmedabad against his wife Bai Vaktuba and Ranjitsingji Agarsingji, a minor, for an injunction restraining both the defendants from asserting that the minor was his son, from establishing that the minor was his natural born son, and from claiming any maintenance as such son. In order to guard the interests of the minor, Gopilal Manilal, Nazir of the District Court of Ahmedabad, was appointed guardian *ad litem*. On the 31st August, 1903, the Nazir applied to the Court that the plaintiff should be directed to pay him two hundred rupees for the expenses of the suit on behalf of the minor. The Court having rejected that application, the Nazir, on the 1st September following, made another application stating that unless he was put in possession of funds he was not in a position to take care of the interests of the minor and that as the Court had rejected his application for such funds, he should be relieved of his position as guardian. This application was also rejected by the Court on the ground that it had no power to compel the plaintiff to give money, and that the Nazir being a Government officer, it had no power to cancel his appointment as guardian.

* Application No. 235 of 1903 under the extraordinary jurisdiction.

(1) (1888) 12 Bom. 553.

The Nazir preferred an application under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) urging, *inter alia*, that the minor being a ward of the Court, it was bound to make an order which would safeguard his interest. A *rule nisi* having been issued requiring the plaintiff to show cause why the order of the Subordinate Judge should not be set aside,

1904.
GOMILAL
MANILAL
s.
AGARSINGJI
RAISINGJI.

Krishnalal M. Jhaveri appeared for the applicant (Nazir) in support of the rule:—By the order of the Judge matters have come to an *im passe*. We are neither relieved of our position as guardian though we complained that we were unable to look after the minor's interests for want of funds, nor was any arrangement made to put us in funds. The plaintiff is a rich *talukdar* and he can very well afford to pay to the minor the expenses for conducting his defence. The minor's mother had applied to be appointed as guardian *ad litem*, but as she is a married woman she cannot be appointed such guardian under section 457 of the Civil Procedure Code. The Nazir, when he is appointed a guardian by the Court, stands in the same position as any other guardian, not a Government servant, would. The fact that the Nazir is an officer of Government would not make any difference. Therefore where the Nazir prays to be relieved from his position as guardian we contend that there is nothing to prevent him from being so relieved.

Courts can, under certain circumstances, ask one of the parties to supply funds to a guardian: Simpson on Infants, p. 499, second edition.

The ruling in *Narayandas Ramdas v. Sahab Husein*⁽¹⁾ affords a guide under such circumstances. We submit that the minor being a ward of the Court every care should be taken to safeguard his interests.

There was no appearance for the opponents (plaintiff and defendant 1).

JENKINS, C. J.:—The Nazir of the District Court, Ahmedabad, who has been appointed guardian *ad litem* of the minor Ranjitsingji, the second defendant in this suit, has presented the

(1) (1888) 12 Bom. 553.

1904.

GOPILAL
MANILAL
v.
AGARSINGJI
RAISINGJI.

present application to us under section 622 of the Code of Civil Procedure, praying that we would, in the exercise of our civil revisional powers, send for the papers in the case and reverse the order of the Subordinate Judge declining to remove the guardian.

The suit is one brought by a plaintiff against the minor and the minor's mother, questioning the legitimacy of the minor. A difficulty was found in procuring a next friend, and so the Nazir of the District Court was appointed apparently under the last clause of section 456 of the Code of Civil Procedure.

We will not now discuss whether it can with propriety be said that the Nazir of the District Court is an officer of the Court of the Subordinate Judge within the view of this section, but will, for the sake of argument, assume that to be the case.

The difficulty in which the Nazir finds himself, and which has led to the present application is, that he has no funds for the purpose of conducting adequately the defence of the minor. Accordingly, we are told, he made an application on the 31st August to have a certain sum paid him by the plaintiff in order that he might be able to take the necessary steps to safeguard the minor's interest, but that application failed. Then on the 1st of September, 1903, the Nazir again represented to the Court that unless he got money for expenses he could not take care of the interests of the minor in the suit, and he accordingly prayed the Judge to remove him from the place of guardian of the minor.

The Subordinate Judge dealt with this application by rejecting it on the ground that, as the Nazir had been appointed guardian by virtue of his holding a Government office, his appointment could not be cancelled, and that after he had been appointed he was bound to take care of the interests of the minor.

The Judge has, in our opinion, misappreciated the position. There is nothing that compels the Court to retain as guardian one of its officers, where the circumstances of the case make it clear that the interests of the minor will be thereby imperilled, and the Court has power to relieve an officer of a position such as that in which the Nazir here finds himself. This accords with common sense, and is supported by the decision of this

Court in *Narayandas Ramdas v. Sahab Hussein*⁽¹⁾, where Sir Charles Sargent says that "the Court may well and indeed ought to refuse to go on with the suit if it should be of opinion that the Nazir has been unavoidably prevented from making himself acquainted with the case against the minor." Later on he says "the Court might well, under such special circumstances" (to which he then refers), "in the event of the plaintiff refusing to provide the means for enabling the Nazir to obtain the necessary information from the minor's relations, cancel the appointment of the Nazir."

Cancelment of the appointment of the Nazir would of course suspend the plaintiff's power to proceed with the suit against the minor.

The Subordinate Judge has clearly misconceived his powers when he considered that it was not within them to direct a cancelment of the appointment of the Nazir as guardian.

We were in hopes that the issue of this Rule would have had the effect of bringing the plaintiff by some proper representative or in person before this Court when we could have disposed of the matter. But he is not here and is not represented, so that we think the proper order will be to set aside the order of the Subordinate Judge and direct him to rehear this application.

In dealing with it he will bear in mind the remarks we have already made, and if he comes to the conclusion (as the facts stated before us most strongly suggest) that the interest of the minor may be seriously imperilled, if the Nazir is not put in funds, then it will be right for him to determine the appointment of the Nazir unless the plaintiff places in the hands of the Nazir a reasonable sum of money to enable the case of the infant to be adequately and efficiently placed before the Court.

The Subordinate Judge will, of course, have regard to the means of the plaintiff, who has been stated before us to be a man of considerable substance, quite capable of furnishing the funds which the Nazir now seeks.

We accordingly make the rule absolute and we direct that the plaintiff do bear the costs of this application.

Rule made absolute.

(1) (1888) 12 Bom. 553 at p. 555.

1904.

GOPINDAL
MANIHAL
v.
AGARSINGJI
RAISINGJI.

APPELLATE CIVIL

Before Mr. Justice Chandavarkar and Mr. Justice Batty.

1904.
June 20.

NANCHAND KHEMCHAND GUJAR (ORIGINAL DEFENDANT No. 2),
APPELLANT, v. YENAWA KOMANNA AND ANOTHER (ORIGINAL PLAINTIFF
AND DEFENDANT No. 1), RESPONDENTS.*

*Succession Certificate Act (VII of 1889), section 4—Certificate—Personal
decree—Suit for sale on a mortgage.*

Section 4 of the Succession Certificate Act (VII of 1889) limits the necessity of a certificate under the Act to those suits in which the Court is called upon to pass a personal decree against a debtor of a deceased person for payment of his debt; and does not apply to a suit for a sale on a mortgage.

Kanchan Modi v. Baij Nath Singh⁽¹⁾, *Baid Nath Das v. Shamanand Das*⁽²⁾ and *Mahomed Yusuf v. Abdur Rahim*⁽³⁾ followed. *Fateh Chand v. Muhammad Bakhsh* not followed. *Santaji Khanderao v. Ravji*⁽⁵⁾ distinguished.

SECOND APPEAL from the decision of B. S. Joshi, Joint First Class Subordinate Judge, A. P., at Satara, reversing the decree passed by K. R. Natu, Subordinate Judge of Islampur.

The plaintiff sued to recover Rs. 108 either by possession of the mortgaged property or by its sale, alleging that the defendant No. 1 had passed to her deceased husband a mortgage-bond for Rs. 99 on the 15th September, 1890.

Defendant 1 admitted the execution of the mortgage-bond, but contended that the bond was satisfied; and that he was not liable to the plaintiff's claim as he had sold the land to defendant No. 2 on the 19th October, 1897. Defendant No. 2 contended that the bond was satisfied.

One of the issues raised in the Court of first instance was: Is a certificate under Act VII of 1889 necessary in this case? This issue was found in the affirmative by the Subordinate Judge who dismissed the suit on the merits, holding that the bond in suit was satisfied.

This decree was, on appeal, reversed by the lower Appellate Court, who passed a decree in favour of plaintiff. The Court

* Second appeal No. 755 of 1902.

(1) (1892) 19 Cal. 336.

(3) (1899) 26 Cal. 839.

(2) (1894) 22 Cal. 143.

(4) (1894) 16 All. 254.

(5) (1890) 15 Bom. 105.

held that a certificate under the Succession Certificate Act (VII of 1889) was not necessary in the circumstances of the case. The following were the reasons:—

1904.

NANCHAND

c.

YENAWA.

"On the question of the necessity or otherwise for a certificate under Act VII of 1889, I think that fiscal enactments must always be construed strictly and in favour of the subject. This has been the tendency of all Courts of Justice. In the absence of any ruling, therefore, of our High Court directly in point, I would choose to follow the decisions of the Calcutta High Court, *viz.*, I. L. R. 19 Cal. 336; *ib.* 22 Cal. 143; *ib.* 26 Cal. 839, in preference to the ruling of the Allahabad High Court relied on by the lower Court (I. L. R. 16 All. 259), and more especially in this case, in which the principal prayer is for possession and the one for realization of the mortgage-debt by sale of the mortgaged property only secondary and in the alternative. It is to be noticed that there is no prayer herein for a personal decree."

Defendant 2 appealed to the High Court.

S. R. Bakhale, for the appellant:—We say that a mortgage debt like all other debts comes within the definition of debts under Succession Certificate Act, 1889. This Court has decided that in the case of mortgage-debts a certificate is necessary: *Santaji Khanderao v. Ravji*⁽¹⁾. The Allahabad High Court also has taken the same view: *Fateh Chand v. Muhammad Bakhsh*⁽²⁾.

K. H. Kelkar, for the respondent:—The object of the Succession Certificate Act, 1889, is to protect a debtor against being required to pay money to a person who may not be the heir at all. Hence, the provision about security. In a decree for sale or foreclosure no such contingency can arise because the decree is against land or some immoveable property. The property is not lost and can always be pursued. It is not a personal decree. The debtor is not compelled to pay. The case of *Santaji Khanderao v. Ravji*⁽³⁾ does not touch the point at all. The only point decided in that case was that a consent decree was within the purview of the Act. The decree in question was a personal decree. This view is supported by the Calcutta High Court: *Kanchan Modi v. Baij Nath Singh*⁽⁴⁾; *Baid Nath Das v. Shamannand Das*⁽⁵⁾; and *Mahomed Yusuf v. Abdur Rahim*⁽⁶⁾. The Calcutta High Court has considered the Allahabad case and dissented from it.

(1) (1890) 15 Bom. 105.

(4) (1892) 19 Cal. 336.

(2) (1894) 16 All. 259.

(5) (1894) 22 Cal. 143.

(3) (1890) 15 Bom. 105.

(6) (1899) 26 Cal. 839.

1904.
NANCHAND
v.
YENAWA.

CHANDAVARKAR, J.:—Section 4 of the Succession Certificate Act has been construed by the Calcutta High Court as limiting the necessity of a certificate under the Act to those suits where the Court is called upon to pass a personal decree against a debtor of a deceased person for payment of his debt and as not applying to a suit for a sale on a mortgage: see *Kanchan Modi v. Baij Nath Singh*⁽¹⁾; *Baid Nath Das v. Shamanand Das*⁽²⁾; and *Mahomed Yusuf v. Abdur Rahim*⁽³⁾.

A Full Bench of the Allahabad High Court has, on the other hand, held in *Fateh Chand v. Muhammad Bakhsh*⁽⁴⁾ that the section applies also to a suit for sale on a mortgage. There is no decision of this Court directly in point. *Santaji Khanderao v. Ravji*⁽⁵⁾ was a case where the suit was for a personal decree against the defendant and also for a sale of the mortgaged property, and the only point decided was that a consent decree is a decree against a debtor, within the meaning of section 4 of the Succession Certificate Act. That decision is, however, useful for the purpose of the point now before us inasmuch as it was held there that the Succession Certificate Act was "intended for revenue purposes as well as to facilitate collection of debts." Being partly a fiscal Act, it must be construed strictly, and the words in section 4, *viz.*, "a decree against a debtor" must be interpreted *prima facie* to mean a personal decree. The reasoning of the Allahabad Full Bench, however, is that "money lent on the security of a mortgage is a debt due from the mortgagor to the mortgagee, although from the terms of the contract it may not be recoverable from the mortgagor personally or except by a decree for sale of the mortgaged property. A mortgagee who brings his suit for sale is bringing his suit against his debtor, the mortgagor, for payment of his debt, and the decree which he seeks in that suit is a decree for payment of his debt by sale of the mortgaged property⁽⁶⁾." Assuming that such a suit is one for the payment of a debt, still the payment has to be made not by the debtor but by sale of the mortgaged property. In other words, it is the property which the suit seeks to, and the decree does, make liable,

(1) (1892) 19 Cal. 336.

(2) (1894) 22 Cal. 143.

(3) (1893) 26 Cal. 839.

(4) (1894) 16 All. 259.

(5) (1890) 15 Bom. 105.

(6) (1894) 16 All. p. 267.

whereas what section 4 provides is that "no Court shall pass a decree *against a debtor* for payment of his debt." It is true, as pointed out in their judgment by the Allahabad Full Bench, that "a decree for sale under section 88 of Act IV of 1882 (The Transfer of Property Act, 1882) orders that "an account be taken of what will be due to the plaintiff for principal and interest on the mortgage," or the decree for sale declares "the amount so due at the date of such decree." The decree for sale also orders that in default of the defendant paying the amount found or declared to be due "the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is so found due to the plaintiff, &c." And the Allahabad Full Bench infer from this language of section 88 of the Transfer of Property Act that "a suit for sale is a suit in which, if the plaintiff succeeds, the decree which the Court passes is one form of a decree for payment of a debt." It may be a decree for payment of the debt, but the question is—Payment by whom? So long as the decree does not direct the defendant to pay the debt, but merely provides that if he does not pay, the mortgaged property shall be sold in satisfaction of the debt, it cannot, we think, without straining the language of section 4 of the Succession Certificate Act, be said to be a decree against the debtor. Had the Legislature intended that the section should apply to a suit for a sale on a mortgage, they would have used apt words to convey that meaning. If it were correct to say that because a decree which the Court passes in a suit for a sale on a mortgage is one form of a decree for payment of a debt, therefore, it must be regarded as a decree against the debtor within the meaning of section 4 of the Succession Certificate Act, the same process of reasoning ought to apply to decrees for foreclosure as well. A foreclosure decree may also be regarded as one form of a decree for payment of a debt. But the Allahabad Full Bench in their judgment concede that a suit for foreclosure cannot in any sense be considered as a suit for a decree for payment of a debt. In one sense, no doubt, every suit on a mortgage, including a suit where a personal decree is sought against the mortgagor, may be regarded as a suit for a decree for payment of a debt. But it is one thing to pass a

1904.

NANCHAND
YENAWA.

1904.

NANCHAND

v.
YENAWA.

decree against the debtor and another to pass a decree against the property mortgaged by him. The Transfer of Property Act itself makes a distinction between a suit where a debt is recoverable from the debtor and one where it can be recovered by a sale of his property mortgaged for the debt. See section 58, the definition of a simple mortgage and of an English mortgage, and section 90. This last section is referred to in the judgment of the Allahabad Full Bench in support of their view that a suit for a sale on a mortgage is one in which the Court is called upon to pass a decree for payment of a debt within the meaning of section 4 of the Succession Certificate Act. But section 90 provides that where under a decree for a sale, the mortgaged property having been sold, "the net proceeds of any such sale are insufficient to pay the amount due for the time being on the mortgage, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such sum." A decree so passed is undoubtedly a personal decree against the debtor which entitles the decree-holder to attach and sell in execution property belonging to the judgment-debtor but not mortgaged for the debt. To that section 4 of the Succession Certificate Act must apply. But it does not follow that such a decree can be passed in every suit for a sale upon a mortgage. Section 90 of the Transfer of Property Act restricts it to cases where "the balance is recoverable from the defendant otherwise than out of the property sold"—only where, that is, the defendant by his contract or otherwise is personally liable for the payment, partly or wholly, of the debt. If the Allahabad Full Bench intended to hold that section 4 of the Succession Certificate Act applied only to such a suit for a sale on a mortgage and not to every suit for a sale, their ruling should not conflict with the view of the Calcutta High Court as to the applicability of that section. Having regard then to the fiscal character of the Succession Certificate Act and the language of section 4, we have arrived at the conclusion that the interpretation put upon that section by the Calcutta High Court is correct. It may be that, as the Allahabad Full Bench point out, "a mortgagor needs as much protection as any other debtor when sued for a debt by a person claiming to be entitled to the effects of his deceased

creditor"; but, on the other hand, as to this question of protection, there is a difference between a mortgagor who has made himself personally liable to pay and also mortgaged his property as security for the debt and one who has made the property alone security therefor. In the former case, he may be sued by one who may not be the legal representative of the creditor and in that case he may have to pay twice over, if the rightful heir sues without being able to recover from the wrong person if the person be insolvent. In the latter, if a wrong person sues and obtains a decree and sells the property, the rightful heir cannot enforce payment from the mortgagor, but must hold the property alone liable and the property remains liable all the same. The mortgagor is no loser and needs no protection.

We think, therefore, that the lower Appellate Court is right in holding that a succession certificate was not necessary in the present case, and we confirm the decree with costs.

Decree confirmed.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Aston.

KRISHNAJI NILKANTH SANE AND ANOTHER, SONS AND HEIRS OF
DECEASED NILKANTH GOVIND SANE (ORIGINAL PLAINTIFFS),
APPELLANTS, v. HARI BIN JANU (ORIGINAL DEFENDANT), RESPONDENT.*

1904.

June 20.

Dekkhan Agriculturists' Relief Act (Act XVII of 1879), Chapter II(1)—Suit based on dispossession of an existing possession—Incidental reference to a mortgage in plaint.

A suit based on a dispossession of an existing possession does not fall within Chapter II of the Dekkhan Agriculturists' Relief Act (Act XVII of 1879). An incidental reference to a mortgage in the plaint does not affect the

* Second appeal No. 737 of 1903.

(1) Chapter II of the Dekkhan Agriculturists' Relief Act. Of the hearing of certain suits by Subordinate Judges.

3. The provisions of this Chapter shall apply to—

(a) Suits for an account whatever be the amount or value of the subject-matter thereof instituted on or after the first day of November, 1879, by an agriculturist in the Court of a Subordinate Judge under the provisions hereinafter contained, and

1904.

KRISHNAJI
v.
HARI.

question when the suit is one to recover possession from a person who is not the mortgagor.

Mulchand v. Ravji⁽¹⁾ followed.

SECOND APPEAL from the decision of L. Crump, District Judge of Satara, confirming the decree of H. D. Rendall, Assistant Judge.

The plaintiff sued to recover possession of the property in suit, alleging that it was mortgaged to him by the owner Nana bin Govind, that he was put in possession and was wrongfully dispossessed by the defendant.

The defendant denied the plaintiff's title and the alleged dispossession.

The suit, in which the claim was valued at Rs. 101-14-0, was originally filed in the Court of the First Class Subordinate Judge of Satara, and after he had framed issues, it was transferred for

(1) (1883) P. J., p. 184.

(b) Suits of the descriptions next hereinafter mentioned and instituted on or after the same date—

(1) when such suits are heard by Subordinate Judges of the First Class and the subject-matter thereof does not exceed in amount or value five hundred rupees, or

(2) when such suits are heard by Subordinate Judges of the Second Class and the subject-matter thereof does not exceed in amount or value one hundred rupees, or

(3) when such suits are heard by Subordinate Judges of the Second Class and the subject-matter thereof exceeds one hundred rupees, but does not exceed five hundred rupees in amount or value and the parties to the suits agree that such provisions shall apply thereto.

The descriptions of suits referred to in clause (b) are the following (namely) :—

(w)	*	*	*	*	*
(x)	*	*	*	*	*

(y) Suits for foreclosure or for the possession of mortgaged property, or for sale of such property, or for foreclosure and sale, when the defendant, or any one of the defendants is an agriculturist.

(2) 51. The District Judge may—

(a) transfer any application pending before a conciliator to the file of any other conciliator;

(b) transfer to his own file any suit or other matter pending before the Court of any Subordinate Judge under Chapter II, Chapter IV or Chapter VI of this Act, and may dispose of the same as if he were a Subordinate Judge; or

(c) stay the proceedings in any such suit or matter, and sit together with such Judge as a Bench to dispose of such suit or matter in accordance with the provisions of this Act.

If the members of any Bench sitting under this section differ in opinion, the opinion of the District Judge shall prevail.

1904.

KRISHNAJI
v.
HARI.

trial to the Court of the Assistant Judge by the order of the District Judge. The Assistant Judge dismissed the suit on the ground that the plaintiff's mortgagor had no authority to mortgage the property.

On appeal by the plaintiff the Judge confirmed the decree. The following is an extract from his judgment :—

The suit was instituted in the Court of the First Class Subordinate Judge, Satara, and was transferred for hearing to the Court of the Assistant Judge. It is a suit of the nature defined in section 3 of Dekkhan Agriculturists' Relief Act. The argument put forward is that the order of transfer is *ultra vires*. The District Judge transferred the suit of his own motion, and it cannot be doubted that, failing the provisions of the Dekkhan Agriculturists' Relief Act, he had power to do so under section 25 of the Civil Procedure Code. It is argued, as section 51⁽²⁾ of the Dekkhan Agriculturists' Relief Act gives the District Judge the power of transfer to his own Court in the case of suits falling under Chapter II, and as the appointment of a Special Judge under section 54⁽³⁾ ousts the jurisdiction of the District Judge, the latter has no

(3) 54. The Local Government from time to time may, and if the Government of India so direct shall, appoint any officer, as Special Judge, to discharge in the place of the District Judge all the functions of the District Judge under this Act in respect of the proceedings of all Subordinate Judges, Village Munsiffs and Conciliators, and may cancel any such appointment.

Such Special Judge shall not, without the previous sanction of the Government of India, discharge any public function except those which he is empowered by this Act to discharge.

No appeal shall lie from any decree or order passed by the District Judge under this Chapter (VII), or by the Special Judge, or by an Assistant or Subordinate Judge appointed under section 52 or by a Bench, in any suit or proceeding under this Act.

(4) 74. Except in so far as it is inconsistent with this Act, the Code of Civil Procedure shall apply in all suits and proceedings before Subordinate Judges under this Act.

(5) 11. Every suit of the description mentioned in section 3, clause (a), (that is, suits for the recovery of money) may, if the defendant, or when there are several defendants, one only of such defendants, is an agriculturist, be instituted and tried in a Court within the local limits of whose jurisdiction such defendant resides and not elsewhere.

Every such suit in which there are several defendants who are agriculturists may be instituted and tried in a Court within the local limits of whose jurisdiction any one of such defendants resides, and not elsewhere.

Nothing herein contained shall affect sections 22 to 25 (both inclusive) of the Code of Civil Procedure.

1904.
KRISHNAJI
v.
HARI.

power to transfer any suit to which the provisions of Chapter VII (II?) apply. There is, however, nothing in the Dekkhan Agriculturists' Relief Act to destroy the general power given by section 25 of the Civil Procedure Code. Section 74⁽⁴⁾ applies to procedure in Subordinate Judges' Courts, while section 11⁽⁵⁾ distinctly preserves the general power of transfer in so far as it might be deemed to be affected by that section. That the Special Judge has a certain jurisdiction does not necessarily imply that the District Judge cannot deal with the same matter. Section 54 clearly contemplates a possible conflict of authority.

The plaintiff preferred a second appeal.

J. R. Gharpure for the appellant (plaintiff):—The Judge was wrong in his opinion that there is nothing in the Dekkhan Agriculturists' Relief Act to affect the provisions of the Civil Procedure Code. The Code is a General Act and the Dekkhan Agriculturists' Relief Act being a special enactment, the passing of that Act abrogated, as far as may be, the provisions of the Code, *generalia specialibus non derogant*, Maxwell on Statutes, pp. 243, 246. This Court has held that the provisions of the Civil Procedure Code are to be applied only when they are not inconsistent with the provisions of the Dekkhan Agriculturists' Relief Act: *Dulichand v. Dhondi*⁽¹⁾; *Shankarapa v. Danapa*⁽²⁾.

Apparently the Judge was misled by the last paragraph of section 11 of the Dekkhan Agriculturists' Relief Act. Owing to the appointment of the Special Judge, the District Judge ceases to have any jurisdiction in cases to which Chapter II of the Act applies. Thus the transfer of the suit to the Court of the Assistant Judge by the order of the District Judge was *ultra vires*: see sections 51, 54 and 74 of the Act.

S. R. Bakhle, for the respondent (defendant):—The Dekkhan Agriculturists' Relief Act applies only to suits for possession by mortgagees on the basis of the mortgage. The present is a suit to recover possession by a dispossessed mortgagee from a person who is not the mortgagor but a different person altogether. Therefore section 3, clause (g), of the Dekkhan Agriculturists' Relief Act does not apply: *Mulehand v. Ravji*⁽³⁾.

(1) (1880) 5 Bom. 184.

(2) (1881) 5 Bom. 604.

(3) (1883) P. J., p. 184.

Gharpure (in reply) :—There is nothing in section 3, clause (g), which excludes suits like the present from its operation, but on the contrary it distinctly relates to suits for possession of mortgaged property.

JENKINS, C. J. :—In our opinion this suit does not fall under Chapter II of the Dekkhan Agriculturists' Relief Act, because it is a suit based on a dispossession of an existing possession, so that the reference to the mortgage in the plaint was incidental and not really necessary. Therefore the case falls within the principle of *Mulchand v. Ravji*⁽¹⁾.

We accordingly confirm the decree with costs.

Decree confirmed.

(1) (1883) P. J., p. 184.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Aston.

RANGNATH SAKHARAM (ORIGINAL PLAINTIFF), APPELLANT, v. GOVIND NARASINV AND OTHERS, SONS AND HEIRS OF DECEASED NARASINV SAKHARAM (ORIGINAL DEFENDANTS), RESPONDENTS.*

1904.

June 21.

Indian Contract Act (IX of 1872), section 16—Amending Act VI of 1899—Fraud—Voidable Contract—Defendant entitled to plead fraud—Lapse of time—Undue influence.

Fraud does not make a transaction void but only voidable at the instance of the person defrauded.

The plaintiff sued in 1900 to recover from the defendant the amount due for interest on a mortgage-bond dated the 15th April, 1893, by sale of the mortgaged property. The defendant contended that he did not execute the bond with free consent and that it was obtained from him under pressure of criminal proceedings.

Held, that the defendant was entitled to resist the claim made against him by pleading fraud, and that he was entitled to urge that plea though he had not brought a suit to set aside the transaction.

Held, further, that under the circumstances he was not precluded from urging that plea by lapse of time: *Jugalas v. Ambashankar*⁽¹⁾ distinguished.

* Second Appeal No. 730 of 1903.

(1) (1883) 12 Bom. 501.

1904.

RANGNATH
SAKHARAMv.
GOVIND
NARASINY.

SECOND APPEAL from the decision of W. Baker, Assistant Judge of Ratnágiri, confirming the decree of K. S. Bodas, Subordinate Judge of Chiplun.

The plaintiff sued in the year 1900 to recover from the defendant, who was plaintiff's brother, Rs. 98 on account of interest for seven years due on a mortgage-bond, dated the 15th April, 1893, by sale of the mortgaged property subject to the lien for the recovery of the principal and further interest under the bond and the deficit, if any, from defendant personally.

The defendant contended that he did not execute the bond with free consent, and that it was obtained from him under pressure of criminal proceedings instituted at the instance of the plaintiff.

The Subordinate Judge dismissed the suit holding, on the evidence, that the defendant did not execute the mortgage-bond in suit with free consent.

On appeal by the plaintiff the Judge confirmed the decree.

The plaintiff having preferred a second appeal,

P. P. Khare appeared for the appellant (plaintiff):—We first contend that the Courts below erred in upholding the defendant's plea of undue influence because it was time-barred. The mortgage was effected on the 15th April, 1893, and he ought to have brought a suit to set aside the mortgage on the ground of undue influence within three years from that date. It is, therefore, not now open to him to set up that plea: *Jugaldas v. Ambashankar*⁽¹⁾.

Next we contend that the facts of the case do not warrant the finding of undue influence. The mortgage was executed by the defendant on the 15th April, 1893, and the criminal case was compromised the day previous. There is no evidence that we induced the defendant to pass the mortgage-deed. The defendant was discharged by the Magistrate under section 253 of the Criminal Procedure Code of 1882. Mere promise of forbearance from proceeding in Court is not a sufficient ground for the inference that the mortgage was induced by undue influence: *Mercer v. Whall*⁽²⁾; *Wilby v. Elgee*⁽³⁾.

(1) (1888) 12 Bom. 501.

(2) (1845) 5 Q. B. 447.

(3) (1875) L. R. 10 C. P. 497.

S. S. Patkar appeared for the respondent (defendant):—Our plea of undue influence is not time-barred. The articles of the Limitation Act apply to suits and not to pleas by way of defence. The ruling in *Jugaldas v. Ambashankar*⁽¹⁾ turns upon the facts of that particular case, and it is explained in *Hargovandas v. Bajibhai*⁽²⁾. It has been held that a defendant's defence is not affected by limitation: *Sobhanadri v. Chalamanna*⁽³⁾; *Krishna Menon v. Kesavan*⁽⁴⁾: see also *Jodraj v. Dinkar Sakharam*, First Appeal No. 47 of 1902, decided on the 27th February, 1903.

The facts as found fully support the finding of undue influence. The first Court found that the agreement of the mortgage was concluded on the 14th April and the *rajindma* in the criminal case was given afterwards. The Judge in appeal held that the transaction was entered into by the defendant under undue influence amounting well-nigh to coercion. We rely on section 16, clause (b), of the Contract Act and the Amending Act VI of 1889. The Courts below have come to the conclusion that the defendant, when he entered into the contract, was a person whose mental capacity was temporarily disturbed by mental distress brought on by the criminal prosecution. Our contention is fortified by *Williams v. Bayley*⁽⁵⁾.

Further, the criminal prosecution was for a non-compoundable offence. Therefore the mortgage in suit, which was virtually an agreement to stifle a criminal prosecution, cannot be enforced, it being opposed to public policy: *Dalsukhram v. Charles De Bretton*⁽⁶⁾; *Keir v. Leeman*⁽⁷⁾; *Srirangachariar v. Ramasami*⁽⁸⁾; *Lound v. Grimwade*⁽⁹⁾. The cases relied on refer to civil proceedings, therefore they do not apply.

JENKINS, C. J.:—The plaintiff by this suit seeks to recover Rs. 98 as interest for seven years on the footing of a mortgage-bond dated the 15th April, 1893.

The defendant has pleaded that he did not execute the mortgage with free consent, and both the lower Courts have held this

(1) (1888) 12 Bom. 501.

(2) (1889) 14 Bom. 222.

(3) (1898) 17 Mad. 225.

(4) (1897) 20 Mad. 305.

(5) (1866) L. R. 1 H. L. 200.

(6) (1904) 28 Bom. 326; 6 Bom. L. R. 73.

(7) (1844) 6 Q. B. 308.

(8) (1894) 18 Mad. 189.

(9) (1888) 39 Ch. D. 605.

1904.

RANGNATH
SAKHARAM
v.
GOVIND
NARASIM.

1904.

RANGNATH
SAKHARAMv.
GOVIND
NARASIM.

plea is made out on the ground that the defendant was induced to execute the document by undue influence.

The plaintiff has appealed, and urges two points: first, that the plea of undue influence cannot be sustained, because it is barred by the Limitation Act, and secondly, that the facts do not support the finding of undue influence.

In support of the plea of limitation reliance is placed on the decision of Sir Charles Sargent in *Jugaldas v. Ambashankar*,⁽¹⁾ but when the facts are examined, it is apparent that the argument now advanced is not supported by the actual decision in the case. There the plaintiffs sued to recover from the defendant Rs. 960 as arrears of rent. The defendant sought to set up as an answer to the claim that the defendant's original landlord had been defrauded by the plaintiffs and that the conveyance by the original landlord to the plaintiffs in that suit was vitiated by fraud.

Now fraud does not make a transaction void, but only voidable at the instance of the person defrauded. The fraud (assuming for the sake of argument that there was fraud in the strict sense of the term) in that case, entitling the defrauded party to avoid, was exercised not upon the defendant, but upon one not a party to that suit who had not avoided the transaction. Under these circumstances it is obvious that it was not open to the defendant in that suit to plead that the transaction was void as against him. It is quite true that Sir Charles Sargent alludes to the fact that the person alleged to have been defrauded had not taken effective steps to impeach the sale, and the relevancy of the allusion is that not having done so, it was not open to the defendant to say that the transaction was void. When the facts of the case are once understood it will be seen that it lays down nothing which is contrary to the doctrine that prevails in the other Courts in India.

A defendant is entitled to resist a claim made against him by pleading fraud, and he is entitled to urge that plea though he may not have himself brought a suit to set aside the transaction, and is not, in circumstances like the present, precluded from urging that plea by the lapse of time.

(1) (1888) 12 Bom. 501.

We, therefore, think that the learned Judges in the lower Courts were right in the view they took.

This brings us to the second point, that the facts do not support the plea of undue influence.

Undue influence has been defined in some detail by Act VI of 1899, where it is (among other things) provided "that a person is deemed to be in a position to dominate the will of another where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of mental distress." Both the Courts have come to the conclusion that the respondent before us was at the time when he made his contract a person whose mental capacity was temporarily affected by mental distress, and, in our opinion, there is sufficient in the facts to justify that conclusion.

For these reasons we think the decree of the lower Court should be confirmed with costs.

Decree confirmed.

ORIGINAL CIVIL.

*Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice; and
Mr. Justice Batchelor.*

HAJI HASSUM OOMER AND ANOTHER (PLAINTIFFS), APPELLANTS, v.
NUR MAHOMED AND OTHERS (DEFENDANTS), RESPONDENTS.*

*Limitation—Appeal—Copy of Judgment—Act XV of 1877, section 12,
Art. 151—Practice.*

1904.
August 11.

The time that elapses between the date of an application for a copy of the judgment complained of and the date of issue of such copy to the applicant is to be excluded in computing the period of limitation prescribed for an appeal.

ON the 13th August, 1903, Judgment in this suit was delivered by Russell, J., in the lower Court. On the 22nd August the plaintiffs applied for a copy of the Judgment, which was issued to them on the 28th August. The decree in this suit was drawn up on the 31st August, and on Monday, 7th September, 1903, the plaintiffs filed the present appeal.

* Appeal No. 1297 of 1903; Suit No. 112 of 1902.

1904.

Haji Hassum
v.
Nur
Mahomed,

Strangman appeared for the appellants.

Lowndes, for respondents :—The plaintiffs having omitted to file this appeal within 20 days from date of Judgment, they cannot now be heard. We rely upon the Judgment of Candy and Tyabji, JJ., in *Jadhoji Raghoji v. Rajoo Babaji*,⁽¹⁾ on which case the present practice of this Court is based.

JENKINS, C. J. :—Section 12 of the Limitation Act XV of 1877 provides that “where a decree is appealed against or sought to be reviewed, the time requisite for obtaining a copy of the Judgment on which it is founded shall also be excluded”; and it is not within the power of the Court to nullify the effect of that section.

I am therefore of an opinion that on the facts of this case the appeal is within time.

Attorneys for appellants : *Messrs. Payne & Co.*

Attorneys for respondents : *Messrs. Malvi, Hirala & Mody.*

TESTAMENTARY JURISDICTION.

Before Sir Lawrence H. Jenkins, R.C.I.E., and Mr. Justice Batchelor.

OCHAVARAM NANABHAI HARIDAS (DEFENDANT), APPELLANT, v.
DOLATRAM JAMIETRAM NANABHAI (PLAINTIFF), RESPONDENT.*

*Grant of Letters of Administration—Scope of enquiry
prior to grant—Practice.*

On the hearing of a petition for issue of Letters of Administration to the estate of a deceased person it is not the province of the Court to go into questions of title to the property to which the Letters of Administration refer.

THE respondent filed a petition under the Testamentary Jurisdiction of the High Court, praying for a grant of Letters of Administration to the estate of his father Jamietram Nanabhai Haridas, who died intestate on 8th September, 1903.

* Appeal No. 1339; Suit 1 of 1904.

(1) (1899) 1 Bom. L. R. 112.

1904.

September 20.

The appellant, who claimed to be a member of the joint family of which the deceased was also alleged to be a member, lodged a 'caveat' against the issue of Letters of Administration to the respondent.*

The case came on before Mr. Justice Russell on the 26th February, 1904.

On behalf of the plaintiff a preliminary issue was raised as to whether the Court would go into questions of title to property to which the Letters of Administration refer.

Lowndes (with *Inverarity*), for the plaintiffs.

Vicaji, for the defendants.

RUSSELL, J. :—Were I to decide in favour of Mr. Vicaji's client I should do so contrary to a long series of cases, and the words in *Hormusji Navroji v. Bai Dhanbaiji*⁽¹⁾, "On the application for probate it is not the province of the Court to go into the question of title with reference to the property of which the will purports to dispose," apply to an application for Letters of Administration with reference to any property to which they may apply.

The plaintiff is the legitimate son of the deceased and, as such, is entitled to Letters of Administration; the defendant has no interest to oppose them. I therefore find on this preliminary issue in the negative as to both the heads of it. I dismiss the caveat with costs, and direct Letters of Administration to issue to the plaintiff saving all just exceptions.

Letters of Administration were issued to the plaintiff in common form.

The defendants appealed against this decision.

Vicaji, for appellants, cited *Guracharya v. Seamirayatharya*⁽²⁾.

Lowndes, for respondents :—The decision of the lower Court was based on the settled practice of these Courts; he cited *Behary Lall v. Juggo Mohun*⁽³⁾; *Hormusji Navroji v. Bai Dhanbaiji*⁽⁴⁾; *Barot Parshotam Kalu v. Bai Muli*⁽⁵⁾; *Birj Nath v. Chandar*

(1) (1887) 12. Bom. 164 at p. 163.

(2) (1878) 4 Cal. 1.

(3) (1879) 3 Bom. 431.

(4) (1887) 12 Bom. 164.

(5) (1893) 18 Bom. 749.

1904.
OCHAVARAM
NANABHAI
v.
DOLATRAM
JAMETRAM.

1904.

OMHAVARAM
NANABHAIDOLATRAM
JAMNATRAM.

Mohan⁽¹⁾; *Arunmoyi Dasi v. Mohendra Nath Wadadar*⁽²⁾; *Kulbantia v. Bahadoor Hazam*⁽³⁾; *Raghu Nath v. Mussamat Pate Koer*⁽⁴⁾.

JENKINS, C. J.:—The point urged on behalf of the appellant is that the deceased was, at the time of his death, joint in family and entitled only to joint property; so that Letters of Administration could not be granted, as though he had left separate property. But in Bombay it has been repeatedly held that on applications for probate the Court will not enter on a question as to the title to the property which the testator by his will purports to leave. *Hormusji v. Bai Dhanbaiji*⁽⁵⁾ and *Barot Parshotam Kalu v. Bai Muli*⁽⁶⁾ may be referred as illustrations in point. Nor is this doctrine peculiar to Bombay; the same view prevails in Calcutta and Allahabad: *Behary Lall Sandyal v. Juggo Mohun Gossain*⁽⁷⁾; *Arunmoyi Dasi v. Mohendra Nath Wadadar*⁽⁸⁾; and *Birj Nath De v. Chandar Mohan Banerji*⁽⁹⁾. It is urged these cases do not touch the present, because here the Court is asked not to grant probate, but Letters of Administration. The petition, however, alleges property in the deceased, and the reasons operating to limit the scope of the inquiry, when probate is sought, are equally applicable to a petition for Letters of Administration. This was recognised by the Allahabad High Court in *Birj Nath De's* case⁽¹⁰⁾, and was actually decided in *Raghu Nath Misser v. Mussamat Pate Koer*⁽¹¹⁾. Nor does the matter rest there; for, on inquiry from the Testamentary Registrar, Mr. Limji N. Banaji, an officer of very great experience, we learn that the invariable practice on the Original Side of this Court is, in applications for Letters of Administration, not to enter into the question whether deceased's property is joint or separate. This view, it has been argued, is in conflict with the decision in *Guracharya v. Scamirayacharya*⁽¹²⁾, but that case has no application. The grant in no way hurts or prejudices

(1) (1897) 19 All. 458.

(2) (1893) 20 Cal. 888.

(3) (1899) 3 Cal. W. N. CCLXXVII.

(4) (1901) 6 Cal. W. N. 345.

(5) (1887) 12 Bom. 164.

(6) (1893) 13 Bom. 749.

(7) (1878) 4 Cal. 1.

(8) (1893) 20 Cal. 888.

(9) (1897) 19 All. 453.

(10) (1897) 19 All. 452.

(11) (1901) 6 Cal. W. N. 345.

(12) (1879) 3 Bom. 431.

the caveator, for it is general in its terms, specifying no item of property and prejudging nothing to the detriment of the appellant. It has been suggested that a grant of Letters might involve peril to the appellant's interest, but this is not so, as on the grant of Letters adequate security is taken. The result then is Mr. Justice Russell's decree is confirmed with costs.

1904.

OCHAVARAM
NANABHAI
v.
DOLATRAM
JAMNITRAM.

Appeal dismissed.

• Attorneys for the appellants—*Messrs. Nadirshah & Tyabji.*

Attorneys for the respondents—*Messrs. Diwit, Dhanjishah & Co.*

ORIGINAL CIVIL.

JUDGMENT IN CHAMBERS.

1904.

October 8.

Before Mr. Justice Chandavarkar.

IN RE BULLOCK.

*Witness—Application in Chambers—Expenses for attendance in Court—
High Court Rule 195.*

A witness who attends the Court on a subpoena is entitled to demand at any time his reasonable expenses of such attendance from the party issuing the subpoena even though he only gives evidence as a witness for a party to the suit other than the party summoning him.

THE facts of this case appear fully in the judgment.

CHANDAVARKAR, J.:—This is an application made to me in chambers by Mr. Bullock in connection with suit No. 205 of 1904, which was decided by me on 26th August, 1904.

Mr. Bullock was a witness subpoenaed by the plaintiff to produce certain documents, but was not examined for the plaintiff; the defendants examined him as their witness. He urges, however, that he attended the Court for four days, waiting to be examined for the plaintiff, and claims expenses from the plaintiff on that account at the rate of Rs. 10 *per diem*.

Mr. Bicknell of Messrs. Bicknell and Merwanji, plaintiff's solicitors, contests the claim on two principal grounds:—

(1) That the Court has no jurisdiction to deal with it; and

1901.

IN RE
BULLOCK.

(2) That Mr. Bullock is not entitled to any of the expenses he claims.

As to the first point, the application is made to me under Rule No. 195 of this Court which runs as follows:—

“Witnesses in civil suits who have not been paid such reasonable sum for their expenses as the Court allows by its rules may apply to the Court at any time in person to enforce the payment of such sums as may be awarded to them.”

Now, Mr. Bicknell’s argument is that this as an application to the Court to enforce payment, cannot lie because under this rule it is essential that a sum should have been awarded before payment of it could be enforced. He contends that the sum could have been claimed by the witness and awarded by the Court only before the witness gave evidence, not afterwards, because it is urged his right to claim and the Court’s summary jurisdiction to award the reasonable expenses ceased the moment he gave evidence without insisting upon payment beforehand or an order for such payment.

I must overrule this preliminary objection, having regard to the decision of West, J., in the *London, Bombay and Mediterranean Bank v. Mahomed Ibrahim Parkar*⁽¹⁾. It appears from the report of the learned Judge’s decision in that case, that the same objection that is now raised before me was raised before him, *viz.*, that a witness who had failed to make his claim before giving his evidence could recover any sum due to him only by a suit. It was there contended, as Mr. Bicknell contends now, after the authority of West J.’s decision has stood unquestioned for nearly a quarter of a century, that no such order as the Court was asked to make had ever been made at this side of the Court. But West, J., said: “The assertion seems not to have been altogether warranted. On enquiring from the Chief Justice”—*i.e.*, Sir Michael Westropp—“I learn that he has frequently made orders for the payment of witnesses’ expenses after they had given their depositions”⁽²⁾. And then West, J., goes on to say that the case is exactly covered by Rule No. 188 of the late Supreme Court. That rule, it will be observed, is in the same terms as our present Rule No. 195, except that the words “as the

(1) (1880) 4 Bom. 619.

(2) (1880) *Ibid* p. 621.

1904.

IN RE
BULLOCK.

Court shall think fit" in the former are altered for the words "as the Court allows by its rules" in the latter.

Passing, then, to the merits of Mr. Bullock's application, one of the grounds on which it is opposed is that the plaintiff, having subpoenaed him only to produce certain documents the witness might have deputed his clerk for that purpose instead of attending the Court himself. I do not think this is a reasonable ground to urge. When a witness has been summoned to produce documents, whether he should produce them himself or by one of his servants is a question which must be left to his discretion, unless the summons distinctly tells him that he might depute one of his servants with the document. The next objection urged is that as Mr. Bullock now admits, and as he admitted in his deposition in the suit itself, that he had no documents to produce, he might have saved himself all the trouble and expense of attendance at the Court by simply writing to the attorneys of the plaintiff to that effect. Mr. Bullock says that in a letter written to them previous to the suit he had given that intimation, but Mr. Bicknell points out that the intimation was that Burdett and Company's papers which he had with him had been taken away by one Patuck. I think that the plaintiff's solicitors ought to have clearly ascertained from Mr. Bullock before summoning him whether he had any of the documents they wanted or not. It does not lie in the mouth of a party summoning a witness to produce a document or documents to say that if the witness had no documents to produce he was bound to tell them instead of attending the Court in obedience to the summons. Witnesses are generally laymen not familiar with the law or rules of our Courts, and I should not interpret any rule or law so as to lay a trap for them. Lastly, I understand Mr. Bicknell to contend that Mr. Bullock, having given evidence for the defendant, has lost his right to ask for his expenses from the plaintiff. The decision of West, J., already cited is an authority for holding that a witness subpoenaed by a party to a cause does not lose his right to be paid the reasonable expenses of attendance at the Court by that party merely because he has not been examined for the said party. In this case there is no doubt the other circumstance that the witness was examined for the other party. But that circumstance

1904.

IN RE
BULLOCK.

cannot, in my opinion, make any difference and extinguish the right which the witness had against the party who subpoenaed him if the witness attended the Court on that subpoena.

The only question that remains is—for how many days did Mr. Bullock attend the Court on the plaintiff's account? Mr. Bullock says he attended for four days. At the last hearing of this motion Mr. Bicknell disputed that and insisted that he should be allowed to put Mr. Bullock on oath and ascertain from him the number of days. Mr. Bicknell is not present to-day and no one appears for the plaintiff. Had any one on plaintiff's behalf been present, I should have allowed him to examine Mr. Bullock, but as no one appears, I refer the question of the reasonable expenses to be paid to Mr. Bullock to the Prothonotary to settle.

GENERAL INDEX.

	Page.
ACCOUNT— <i>Partition suit—Account of past transactions.</i> In a partition suit no coparcener has any right to an account of past transactions.	
NARAYAN BIN BABAJI v. NATHAJI DURGAJI ...	(1903) 28 Bom. 201
<i>Transfer of Property Act (IV of 1882), sec. 72 — Mortgagee in possession expending money to defend his title against mortgagor.</i> A mortgagee in possession is, under section 72 of the Transfer of Property Act (IV of 1882), entitled to add to his mortgage-debt, in the absence of a contract to the contrary, sums spent by him for making his own title thereto good against the mortgagor. The mere fact that in a redemption suit the mortgagee in possession did not give details of the sums either in the course of the trial or in his written statement is not sufficient to deprive him of his right, seeing that those details can be gone into after the redemption decree providing for an account has been passed.	
DATTARAM v. VINAYAK... ..	(1903) 28 Bom. 181
ACQUIESCENCE— <i>Decree—Execution—Claim of interest not provided by the decree.</i>	
See DECREE	393
<i>Question of legal inference—Estoppel, requirements of—Plea of estoppel appearing for the first time in issues in appeal—Indian Evidence Act (I of 1872), sec. 115.</i>	
See ESTOPPEL	440
ACTS.—	
1880—XLV. SEC. 193.	
See PERJURY	479
See FALSE EVIDENCE	533
1831—XX, SEC. 18.	
See BOMBAY MINORS' ACT... ..	181
1869—XIV, SEC. 32.	
See JURISDICTION	529
1871—XXIII, SEC. 6.	
See PENSIONS ACT	241
1872—I.	
See PERJURY	479
SECS. 11, 51.	
See GAMBLING... ..	129
SECS. 31 (2), 34.	
See EVIDENCE ACT	294
SEC. 47.	
See EVIDENCE ACT	58
SEC. 92.	
See CIVIL PROCEDURE CODE	310
SEC. 92, PROV. 1.	
See CONTRACT	420
SEC. 115.	
See BHAGDARI AND NARWADARI ACT	399
See ESTOPPEL	440

ACTS—continued.

	Page.
1872—III, SEC. 19.	
<i>See</i> BRAHMO SAMAJ	597
IX, SECS. 2, 23, 25 AND 63.	
<i>See</i> MUNICIPALITY.	66
SEC. 16.	
<i>See</i> MORTGAGE	371
<i>See</i> CONTRACT ACT	639
SEC. 23.	
<i>See</i> CONTRACT ACT	326
SEC. 30.	
<i>See</i> WAGERING CONTRACTS	616
1876—X, SEC. 4 (a).	
<i>See</i> BOMBAY REVENUE JURISDICTION ACT	435
SEC. 4 (b).	
<i>See</i> BOMBAY REVENUE JURISDICTION ACT	74
SEC. 11.	
<i>See</i> SPECIFIC RELIEF ACT	382
1877—I, SECS. 21 AND 30.	
<i>See</i> SPECIFIC RELIEF ACT	1
SEC. 41.	
<i>See</i> TRANSFER OF PROPERTY ACT	181
SEC. 42.	
<i>See</i> SPECIFIC RELIEF ACT	382, 567
SEC. 15.	
<i>See</i> LICENSE	253
III, SEC. 17 (c).	
<i>See</i> REGISTRATION ACT	361
SEC. 77.	
<i>See</i> REGISTRATION ACT	8
XV, SECS. 5, 14.	
<i>See</i> LIMITATION ACT	235
XV, SEC. 12, ART. 151	
<i>See</i> LIMITATION ACT	643
SEC. 20.	
<i>See</i> LIMITATION ACT	248, 262
SEC. 22.	
<i>See</i> LIMITATION ACT	11
SCH. II, ART. 47.	
<i>See</i> LIMITATION ACT	215, 601
ART. 119.	
<i>See</i> LIMITATION ACT	94
ART. 179, CL. 5.	
<i>See</i> LIMITATION ACT	416
1879—I, SEC. 11.	
<i>See</i> STAMP ACT	432
XVII, CHAPTER II.	
<i>See</i> DEKKHAN AGRICULTURISTS' RELIEF ACT	635
1882—IV, SECS. 54, 56 (6) (b).	
<i>See</i> TRANSFER OF PROPERTY ACT	466

GENERAL INDEX.

iii

ACTS— <i>continued.</i>	Page.
1882—IV, SEC. 58.	
<i>See</i> MORTGAGE	
—SECS. 58, 60 AND 86.	349
<i>See</i> MORTGAGE...	
—SEC. 72.	371
<i>See</i> TRANSFER OF PROPERTY ACT	
—SECS. 75, 85, 86, 91.	181
<i>See</i> REDEMPTION	
—SEC. 93.	153
<i>See</i> TRANSFER OF PROPERTY ACT	
—XIV, SEC. 13, EXPL. II.	102
<i>See</i> LIMITATION ACT	
—SEC. 26.	215
<i>See</i> MISJOINDER OF PARTIES	
—SEC. 30.	94
<i>See</i> JOINDER OF PARTIES	
—SEC. 32.	209
<i>See</i> LIMITATION ACT	
—SEC. 43.	11
<i>See</i> CIVIL PROCEDURE CODE	
—SECS. 225, 228, 244, 588.	447
<i>See</i> EXECUTION	
—SEC. 248.	378
<i>See</i> LIMITATION ACT	
—SEC. 257-A.	416
<i>See</i> CIVIL PROCEDURE CODE	
—SEC. 265.	62, 310, 383
<i>See</i> EXECUTION...	
—SEC. 266 (c).	238
<i>See</i> CIVIL PROCEDURE CODE	
—SECS. 278—283, 622.	125
<i>See</i> CIVIL PROCEDURE CODE	
—SEC. 295.	458
<i>See</i> CIVIL PROCEDURE CODE	
—SECS. 520, 521 AND 526.	264
<i>See</i> AWARD	
—SEC. 539.	287
<i>See</i> CIVIL PROCEDURE CODE	
—SEC. 592, PROVISIO.	20
<i>See</i> CIVIL PROCEDURE CODE	
1887—IX, SEC. 32 (2).	451
<i>See</i> PROVINCIAL SMALL CAUSE COURTS ACT	
1889—VII.	244
<i>See</i> SUCCESSION CERTIFICATE ACT	
—SEC. 4.	119
<i>See</i> SUCCESSION CERTIFICATE ACT	
—SEC. 6, CL. (2).	630
<i>See</i> SUCCESSION CERTIFICATE ACT	
1890—VIII, SEC. 27.	344
<i>See</i> SUCCESSION CERTIFICATE ACT	
	344

ACTS—continued.		Page
1838—V, SECS. 303, 304.		
<i>See</i> JURY ...	...	412
—SEC. 342.		
<i>See</i> GAMBLING ...	...	129
—SECS. 435, 439.		
<i>See</i> PERJURY ...	...	479
<i>See</i> FALSE EVIDENCE ...	...	533
1899—II, SEC. 12 (3).		
<i>See</i> STAMP ACT ...	...	432
—VI.		
<i>See</i> CONTRACT ACT ...	...	639
ACTS (BOMBAY)—		
1863—V, SECS. 3, 5.		
<i>See</i> BHAGUARI AND NARAWDARI ACT ...	...	390
1874—I, SEC. 30.		
<i>See</i> TRAMWAYS ACT ...	...	502
1876—III.		
<i>See</i> LIMITATION ACT ...	...	215
—SECS. 4, 15, 18 AND 21.		
<i>See</i> LIMITATION ...	...	601
1879—V.		
<i>See</i> SPECIFIC RELIEF ACT ...	...	332
—VII. SECS. 3, SUB-SEC. (2), 5, 8, 23, 27, 28.		
<i>See</i> BOMBAY IRRIGATION ACT ...	...	105
1884—II, SECS. 27 (2) (17) AND 30.		
<i>See</i> MUNICIPALITY ...	...	66
1887—IV, SECS. 4, 5, 6, 7.		
<i>See</i> GAMBLING ...	...	129
1888—III, SEC. 39A.		
<i>See</i> LICENSE ...	...	253
—VI, SEC. 12.		
<i>See</i> JOINDER OF PARTIES ...	...	209
1890—II, SEC. 47 (a).		
<i>See</i> BOMBAY SALT ACT ...	...	346
1901—III.		
<i>See</i> BOMBAY DISTRICT MUNICIPAL ACT ...	...	340
ADMINISTRATOR-GENERAL, <i>SUIT AGAINST—Civil Court—Jurisdiction—</i>		
<i>Bombay Civil Courts Act (XIV of 1869), sec. 32.</i>		
<i>See</i> JURISDICTION ...	...	529
ADMISSION— <i>Hindu Law—Milkshara—Debts—Surety—Grandson's liability to pay debts contracted by the grandfather as a surety.</i> A party is not bound, generally speaking, by a pleader's admission in argument on what is a pure question of law amounting to no more than his view that the question is unarguable.		
NARAYAN v. VENKATACHARYA ...		(1904) 28 Bom. 408
ADOPTION— <i>Hindu Law—Co-widows—Estate vested in one co-widow by inheritance from her son—Adoption by the other co-widow.</i> A co-widow cannot make an adoption without the consent of the other co-widow in whom by inheritance from her son the whole estate had become vested.		
<i>Rakhmabai v. Badhabai</i> (1868), 5 Bom. H. C. R. (A. C. J.) 81, distinguished. <i>Sembla</i> , the consent of the other co-widow would not validate the adoption.		
ANANDIBAI v. KASHIBAI ...		(1904) 28 Bom. 461

GENERAL INDEX.

ADOPTION—*Suit to declare validity of adoption—Interference with adopted son, nature of*—*Limitation Act (XV of 1877), Sch. II, Art. 119.*

See MISJOINDER OF PARTIES...

ADVERSE POSSESSION—*Bhagdari and Narwadari Act (Bombay Act V of 1862), secs. 3, 5.] The Collector can take action at any time under section 3 of the Bhagdari and Narwadari Act (Bombay Act V of 1862): and the plea of adverse possession cannot prevail against any order that he may make.*

Dala v. Parag Khushal (1902) 4 Bom. L. R. 797, followed.

It is of the essence of the title by adverse possession that it must relate to some property which is recognized by law.

JETHABHAI vs. NATHABHAI

(1904) 28 Bom. 399

*Redemption suit—Mortgage by persons other than the real owner—Acquiescence of the real owner—Mortgagee's possession adverse to the real owner.] On the 24th October, 1873, one Durgan, widow of Govindji, mortgaged with possession certain land to Godaji, the husband of her daughter Rau. After Durgan's death in 1882, the plaintiffs, under a belief then prevalent, claimed as the nearest *Waras Bhaubands* of Govindji to have succeeded to the mortgaged property, to the exclusion of Govindji's daughter Rau, and disputed the validity of Durgan's mortgage. Godaji thereupon, on the 22nd June, 1882, accepted a mortgage from the plaintiffs. Rau was aware of this transaction and acquiesced in it. In July, 1889, Rau sold her equity of redemption to one Savliaram, who paid off Godaji's mortgage and recovered possession of the mortgaged property. The plaintiffs, in September, 1899, brought a suit against Godaji and Savliaram, defendants 1 and 2, to redeem the mortgage of the 22nd June, 1882.*

Held, that the plaintiffs were entitled to redeem, Rau's claim to the equity of redemption having become time-barred. After the mortgage in suit Godaji held the property as plaintiffs' mortgagee and his possession must be attributed to a right derived from them, Rau being aware of what was being done and having acquiesced in it. Though Godaji's possession in its inception was not by virtue of a right derived from the plaintiffs still his possession was from the 22nd June, 1882, under colour of a right derived from them and so adverse to Rau, and that to her knowledge although Godaji took possession under a mistake common to all as to Rau's rights, still that circumstance did not make his possession any the less adverse.

PURSHOTTAM v. SAGAJI

(1903) 28 Bom. 87

AGREEMENT—*Contract Act (IX of 1872), secs. 2, 23, 25 and 63—Dispensation or remission—Promise—Contract by Corporation—Executed consideration.*

See CONTRACT ACT

void—Agreement to stifle a prosecution—Compounding a non-compoundable offence—Agreement as defence in a civil action.

See CONTRACT ACT

APPEAL—*Collector's action—Appeal to Commissioner—Civil Court—Bhagdari and Narwadari Act (Bom. Act V of 1862), secs. 3, 5.] Held* that an appeal from an order passed by the Collector under section 3 of the Bhagdari and Narwadari Act (Bom. Act V of 1862) lies to the Commissioner.

JETHABHAI v. NATHABHAI

(1904) 28 Bom. 399

Decree—Execution—Decree passed without jurisdiction—Jurisdiction—Civil Procedure Code (Act XIV of 1882), secs. 225, 228, 244, 588.

See EXECUTION

378

APPEAL—*Execution of decree—Order—Order passed without jurisdiction—Civil Procedure Code (Act XIV of 1882), secs. 278—283; 622.*

Held, that an order passed under section 280 of the Civil Procedure Code (Act XIV of 1882), is not appealable.

DAYARAM v. GOVARDHANDAS ... (1904) 28 Bom. 458

—*Provincial Small Cause Courts' Act (IX of 1887), sec. 32 (2)—Small Cause Suit—Jurisdiction extended pending suit.* A suit to recover Rs. 81-4 was filed in the Court of a Subordinate Judge who was at the time invested with the jurisdiction of a Court of Small Causes to the extent of Rs. 50. Later the jurisdiction of the Subordinate Judge as a Court of Small Causes was raised to Rs. 100 and subsequently to this the suit was decided by him as a regular suit and the claim was allowed. On appeal by the defendant the District Judge held that no appeal lay on the ground that the suit was triable and must be taken to have been tried by the Subordinate Judge in the extended jurisdiction vested in him as a Judge of the Court of Small Causes.

Held, on an application by the defendant under section 622 of the Civil Procedure Code (Act XIV of 1882) that the appeal lay to the District Judge. Under section 32 (2) of the Provincial Small Cause Courts' Act (IX of 1887), it was necessary that the Judge should, before the institution of the suit, be invested with a Small Cause Court jurisdiction entitling him to hear the particular suit.

Hari Kamayya v. Hari Venkayya (1903) 26 Mad. 212, followed. *Balchand v. Balaram* (1903) 5 Bom. L. R. 398, explained.

SAMBHU DHANAJI v. RAM VITHU ... (1903) 28 Bom. 244

ARBITRATION—*Award—Allegations against the award—Refusal to file the award—Objections must be proved to the satisfaction of the Court—Civil Procedure Code (Act XIV of 1882), secs. 520, 521 and 526.*

See AWARD ... 287

ASSESSMENT, *arrears of—Inamdar—Occupancy tenant—Purchase from the occupancy tenant—Decree for assessment—Money decree against the occupants—Charge on land.* The plaintiff, an Inamdar, sued to recover assessment due for the years 1895-96 and 1896-97 from defendant 2 who came in as a purchaser from the original occupancy tenant on the 5th April, 1899. The Lower Court passed a personal decree against defendant 2 for the arrears of assessment.

Held, that defendant 2 was not liable, since an Inamdar suing for assessment was not entitled to a charge on the lands but only to a money decree against the occupants.

Ratanji v. Sakharam (1884) P. J., p. 68, followed.

VINAYAK v. LAKSHMAN : LAKSHMAN v. VINAYAK ... (1903) 23 Bom. 92

ATTACHMENT—*Civil Procedure Code (Act XIV of 1882), sec. 266 (c)—House—Sale in execution—Exemption from liability to attachment or sale.*

See CIVIL PROCEDURE CODE ... 125

AWARD—*Civil Procedure Code (Act XIV of 1882), secs. 520, 521 and 526—Arbitration—Award—Allegations against the award—Refusal to file the award—Objections must be proved to the satisfaction of the Court.* It is not sufficient merely to allege a cause or ground against the filing in of an award such as is indicated in sections 520 and 521 of the Civil Procedure Code (Act XIV of 1882), but the cause or the ground must also be proved to the satisfaction of the Court.

Dandekar v. Dandekars (1882) 6 Bom. 663, followed; *Venkatesh Khando v. Chanappagadda* (1892) 17 Bom. 674 and *Tejpur v. Mahomed Jamal* (1896) 20 Bom. 596, distinguished.

DHANJIBHAI GIRDHARBHAI v. MATHURBHAI GHELABHAI ... (1903) 28 Bom. 287

GENERAL INDEX.

vii

AWARD—*Suit to recover money due on an award—Specific Relief Act (I of 1877), secs. 21 and 30.—Specific performance—Damages.* In a suit for the recovery of a certain sum of money with interest due on an award and on the failure of the defendant to pay, for the recovery of the same from the defendant's property, it was contended that the plaintiff was not entitled to the relief sought, having regard to sections 21 and 30 of the Specific Relief Act (I of 1877).

Held, disallowing the contention, that the suit was not for specific performance. It was a suit for the recovery of money and for relief incidental thereto.

FARDUNJI EDALJI v. JAMSETJI EDULJI ...

... (1903) 28 Bom.

1

BHAGDARI AND NARWADARI ACT (BOMBAY ACT V OF 1862), SECS. 3, 5

—*Bhag—Narwa—Recognized sub-divisions of a Narwa compromise effecting a subdivision not recognized—Void compromise—Collector's action—Appeal to Commissioner—Civil Court—Adverse possession—Evidence Act (I of 1872), section 115—Estoppel.* At the death of K, a sub-sharer holding a recognized subdivision in a *narwa*, disputes arose between plaintiffs and defendants as to the heirship. The disputes led to a suit by the plaintiffs, wherein they failed. Before, however, the period for appeal expired, the parties effected an amicable settlement, by which the defendants gave up their rights in favour of the plaintiffs over half of a survey number, which was a part of a *narwa* holding governed by the Bhagdari and Narwadari Act (Bombay Act V of 1862). Later on the defendants thereupon applied to the Collector, complaining that the plaintiffs had alienated the property contrary to the provisions of the Bhagdari and Narwadari Act (Bombay Act V of 1862), and praying that the alienation being void, they (the defendants) should be placed in possession of the land. The Collector declined to interfere; but, on appeal, the Commissioner held otherwise and directed the defendants to be put in possession of the land. The plaintiffs then filed a suit to recover the possession of the land.

Held, that as the effect of the compromise arrived at between the parties was to alienate a portion of a *bhag* or share in a *narwa* other than a recognized subdivision of such *bhag* or share it was void within the meaning of section 5 of the Bhagdari and Narwadari Act (Bombay Act V of 1862); that the plaintiffs acquired no rights under the compromise, and that therefore they were not entitled to any relief.

An appeal from an order passed by the Collector under section 3 of the Bhagdari and Narwadari Act (Bombay Act V of 1862) lies to the Commissioner.

The Collector can take action at any time under section 3 of the Bhagdari and Narwadari Act (Bombay Act V of 1862); and the plea of adverse possession cannot prevail against any order that he may make.

Data v. Parag Khushal (1902) 4 Bom. L. R. 797, followed.

It is of the essence of the title by adverse possession that it must relate to some property which is recognized by law.

JETHABHAI v. NATHABHAI ...

... (1904) 28 Bom. 399

BILL OF LADING—*Goods shipped under sub-charter and bills of lading authorized by time charter—Liability of such goods for lien given by time charter—Notice of time charter—"Without prejudice to this charter," meaning of—Form, construction, and effect of bills of lading—Lien for hire of vessel—Charter-party—Power to sublet—Sub-charter.*

See CHARTER-PARTY ...

BOMBAY DISTRICT MUNICIPAL ACT (BOMBAY ACT III OF 1901)—Non-feisance—Negligence in performance of duty towards plaintiff—Suit for damages. The plaintiff, an inhabitant of Ahmedabad, having brought a suit against the Ahmedabad Municipality to recover damages sustained by him in respect of an

... 573

injury caused to his horse and carriage in consequence of the neglect of the Municipality to repair a road,

Held, that, as the default leading to the damage was a mere non-feasance, the suit must fail for the statute does not impose upon the Municipality a duty towards the plaintiff which they negligently failed to perform.

ACHRATLAL v. THE AHMEDABAD MUNICIPALITY

... (1904) 28 Bom. 340

BOMBAY IRRIGATION ACT (BOM. ACT VII OF 1879), *secs. 3, sub-section (2), 5, 8, 23, 27, 28*—*Nālā*—*Water-course* Canal—Irrigation Department—*Right to control water or to obstruct the use thereof*—*Riparian Proprietor*—*Enjoyment and benefit of water*—*Strict construction of statutes encroaching on the rights of subjects*.] The defendant was in possession of a plot of land, Survey No. 13, and a *nālā*, that is, a water-course, ran past that plot of land. The *nālā* was crossed at a considerable distance to the north of the defendant's land by a Government irrigation canal. The water flowing in the *nālā* was derived from two sources: (1) from the rain water from the hills and catchment area of the *nālā*, and (2) from percolation of water or waste from the canal. Apart from abnormal periods of drought, the second of the two sources was perennial and the more important of the two. Before the canal was made there was a surface flow in a portion of the *nālā*, and this flow lasted through the rains and for a portion of the cold weather and there was no flow after December. For seven hundred yards below the point of contact of the canal and the *nālā*, the *nālā* was normally dry and gravelly for many months, but at a point some seven hundred yards lower down the canal there was a spring and thence downwards there was a perennial stream. The *nālā*, however, throughout the rainy months held a fair body of water. In the year 1897, the Irrigation Department put a dam across the *nālā* and thereby infringed the defendant's riparian right. The defendant thereupon brought a summary suit against the Executive Engineer for Irrigation and his subordinates in the Court of the Mámlatdár of Haveli for the removal of the dam and obtained a decree in his favour. Thereupon the Secretary of State for India, as plaintiff, brought the present suit against the defendant praying that his right to control the water in the water course (*nālā*) in suit and to obstruct the use of such water therein by the defendant subject to the conditions imposed by the Bombay Irrigation Act (Bom. Act VII of 1879) should be declared. The first Court rejected the suit. The plaintiff having appealed,

Held, confirming the decree, that the water-course with which the defendant was concerned was a stream as that word is legally understood. It was a natural channel and not one constructed under the provisions of the Bombay Irrigation Act. It was not in direct communication with the canal; there was no agreement for the supply of water under the Act, and such water (if any) as found its way from the canal into it came there by percolation. The defendant got the water from the canal, not because he was entitled to it, but because it came to him, and it would be open to the canal authorities to take such measures as would prevent the percolation.

As defendant had the right of a riparian proprietor to the usufructuary interest in the water in the *nālā*, which was incidental to the possession of the adjacent soil, it followed that whatever might be the nature of the tenancy, he as the occupant of the land abutting on the stream, and not the Government, was entitled to the enjoyment and benefit of the water as it flowed past.

A natural stream, though its flow of water be in part derived by percolation from a canal, is not a canal until the Governor in Council has applied to it the provisions of section 5 of the Bombay Irrigation Act.

Statutes which encroach on the rights of subjects whether as regards person or property must receive a strict construction.

SECRETARY OF STATE FOR INDIA v. BALVANT GANESH ... (1903) 28 Bom. 105

BOMBAY MINORS' ACT (XX OF 1864), SEC. 18—*Minor—Administrator—Sanction of the Court—Transfer of Minor's interest as mortgagees in possession—“Any immoveable property.”*] The expression “any immoveable property” in section 18 of the Bombay Minors' Act (XX of 1864) means immoveable property of any character or kind whether held by the minor as owner, or mortgagee, or in any other right. Hence the administrator of a minor, appointed under Act XX of 1864, could not sell immoveable property held by the minor as a mortgagee in possession without the previous sanction of the Court.

DATTARAM v. VINAYAK ... (1903) 28 Bom. 181

MUNICIPAL ACT (CITY OF) (III OF 1888), SEC. 394—*License—Specific Relief Act (I of 1877), sec. 45—Discretion.*] The power of the Municipal Commissioner of Bombay to grant a license under section 394 of the City of Bombay Municipal Act (III of 1888) includes the power to refuse it.

PER CURIAM:—The Court cannot substitute its judgment for that of the Municipal Commissioner. Unless it is clear beyond doubt that the Municipal Commissioner is using his authority with some indirect motive and for a collateral purpose, not for the purpose for which the Legislature has armed him with the power, the Court cannot interfere with his discretion.

HAJI ISMAIL v. MUNICIPAL COMMISSIONER OF BOMBAY : AHMED MOOSA v. MUNICIPAL COMMISSIONER OF BOMBAY ... (1908) 28 Bom. 253

REVENUE JURISDICTION ACT (X OF 1876), SEC. 4 (a)—*Service land—Sandd grant—Suit for the recovery of possession—Secretary of State for India in Council, defendant—Jurisdiction.*] The plaintiff, a vendee of certain lands assigned as remuneration for village service, having brought a suit for the recovery of the lands against the Secretary of State for India in Council and another defendant who was put in possession of the lands by Government officers,

Held, that under section 4 (a) of the Bombay Revenue Jurisdiction Act (X of 1876), a Civil Court had no jurisdiction to entertain the suit against the Secretary of State for India in Council (the grant being of land and not of revenue).

The plaintiff having contended that his claim was for the possession of lands and not for the revenue arising therefrom which alone was granted,

Held, that the plaintiff's vendor was put into the occupation of the land free from assessment as the reward of his service and that his remuneration did not and could not consist in an exemption from assessment in respect of the lands without reference to his occupation.

APPALI v. THE SECRETARY OF STATE FOR INDIA ... (1904) 28 Bom. 435

SEC. 4 (b)—*Inamdar—Occupancy tenant—Claim by the inamdar to recover assessment according to the survey rates—Tenant setting up fixed assessment—Objections under sec. 4 (b)—Civil Court—Jurisdiction.*] The plaintiff, an Inamdar, sued to recover from the defendant, an occupant, the assessment of the lands held by him in accordance with the survey rates. The defendant contended, among other things, that under certain *Maphi Istawa Kowls* held by him, he had acquired the right to hold the lands permanently on payment of a fixed sum as rent. Plaintiff contended that by virtue of section 4, clause (b), of the Bombay Revenue Jurisdiction Act (X of 1876), the Civil Court was precluded from entertaining the defendant's contention.

Held, that clause (b) of section 4 of the Bombay Revenue Jurisdiction Act (X of 1876) presented no bar to the hearing by the Civil Court of the contention set up by the defendant.

An objection to come within 1st head of section 4, clause (b), of the Bombay Revenue Jurisdiction Act (X of 1876), must be "to the amount or incidence of any assessment of land revenue" itself and as such, in other words, apart from the question of any other and independent right, if an occupancy tenant complains that though he is bound to pay the assessment of land revenue, the amount or incidence of it as authorized by Government is too high, having regard to the nature of the soil and quality of his land and other like considerations, the objection is one purely and simply to such amount or incidence. But if without questioning the legality or propriety of the amount or incidence *per se*, he asserts a right independent of, and having no relation to it, such as a right to pay a certain fixed amount annually under a contract between him and the Inamdar he cannot be said to object to the amount or incidence of the assessment. Nor can such a tenant be said by his objection to object to the validity or effect of the notification of survey or settlement under the 3rd head of clause (b) of section 4 of the Bombay Revenue Jurisdiction Act (X of 1876).

"Objections" in section 4, clause (b) of the Act, can be raised by a suit or in defence to a suit.

LAKSHMAN v. GOVIND ... (1903) 28 Bom. 74

BOMBAY SALT ACT (BOMBAY ACT II OF 1890)—*Salt—Removal of Salt—Intention—Knowledge—Ingredients of the offence.* To support a conviction under section 47 (a) of the Bombay Salt Act (Bombay Act II of 1890) it is not necessary to prove dishonest intention on the part of the accused; since the wording of the clause does not in express terms or by necessary implication make intention or knowledge an essential ingredient of the offence. What is prohibited by the Act is the removal of salt in contravention of any license or permit and that shows that such removal is prohibited in itself.

EMPEROR v. MAGANLAL ... (1904) 28 Bom. 346

—TRAMWAYS ACT (BOM. ACT I OF 1874), SEC. 30—*Purchase by Municipal Corporation of Bombay of Tramway undertaking—Notice of intention to purchase—Arrangement by Corporation with third person—Date of purchase for purpose of ascertaining compensation—Liability of Tramway Company for track rent during period between notice and date of purchase.* By an agreement, dated 12th March, 1873, the Municipal Corporation of Bombay (the respondents) allowed certain persons, of whom the Bombay Tramway Company (the appellants) were the assignees, to construct and work tramways in the City of Bombay. Section 30 of the Bombay Tramways Act (Bombay Act I of 1874) gave the respondents the right to purchase the tramways from the appellants "with the plant, stores, rolling-stock and everything connected therewith after the expiration of 21 years from the 12th day of March, 1873, upon declaring their intention so to do within six months after the expiration of the said 21 years" and gave them "a renewed right of purchase at the end of every seven years after the expiration of the said 21 years upon similar notice being given." Notice of the intention to exercise such renewed right of purchase was duly given by the respondents on 14th March, 1901. In a suit by the appellants against the respondents to have their rights under the purchase declared,

Held, by the Judicial Committee (affirming the decision of the Courts below), that the notice was not invalid by reason of the respondents having made an arrangement with a third person who was to find the money for the purchase and work the tramways when acquired by the respondents, it appearing that the respondents were acting as principals in the matter, and not as agents of such third person, and that there was nothing in the Act to prohibit such a transaction or to show that when acquired the respondents were bound to keep the tramways in their own hands, and work them themselves.

By section 30 of the above Act it was further enacted that "the amount to be paid in the event of such purchase shall be the actual *bond fide* value (exclusive of any compensation for goodwill, premium, or compulsory sale or other consideration whatsoever) of the tramways and of the works and materials connected therewith and of the lands and buildings and all other the property of the grantees, such value in case the parties do not agree to be decided by arbitration as provided by the agreement of 12th March, 1873; and as compensation for the goodwill, premium, or compulsory sale and other consideration the grantees shall be paid an amount equal to 20 years' purchase calculated on the average profits of the previous 3 years next preceding the purchase." The first Court decided that the date of the purchase for the purpose of "ascertaining the compensation was the date of the notice, namely, the 14th March, 1901; but both parties appealed from that decision. The High Court on appeal held that the date of the purchase would be the date when the value was ascertained.

Held, by the Judicial Committee, that the proper date to be fixed would have been when the relation of vendor and purchaser was definitely created by the service of the notice of intention to purchase, that is, the 14th March, 1901; but that having regard to the course taken by the parties, neither party without the consent of the other could insist that that date ought to be adopted, and that under the circumstances there were no grounds for disturbing the date fixed by the High Court on appeal, namely, the date of the award fixing the value of the corporeal property of the appellants.

Pending the ascertainment and payment of the purchase-money the appellants agreed to continue to work the tramways on the understanding that they received "the income and profits of the tramway business during such period."

Held, by the Judicial Committee (affirming the decision of the High Court on appeal), that the appellants were liable for track rent during the period they so continued to work the tramways: so long as they took the profits they must pay the ordinary expenses of working them, and the track rent.

BOMBAY TRAMWAY COMPANY v. THE MUNICIPAL CORPORATION OF

BOMBAY ... (1904) 28 Bom. 502

BRAHMO-SAMAJ—Marriage—Polygamy—Act III of 1872, sec. 19.] A marriage performed in accordance with the rites of the Brahmo-Samaj is invalidated by the fact that either of the parties thereto has a husband or wife by a previous marriage alive.

SONALUXMI v. VISHNUPRASAD ... (1903) 28 Bom. 597

CANAL—Bombay Irrigation Act (Bom. Act VII of 1879), secs. 3, sub-section (2), 5, 8, 23, 27, 28—Nala—Water course—Irrigation Department—Right to control water or to obstruct the use thereof—Riparian Proprietor—Enjoyment and benefit of water—Strict construction of statutes encroaching on the rights of subjects.] A natural stream, though its flow of water be in part derived by percolation from a canal, is not a canal until the Governor in Council has applied to it the provisions of section 5 of the Bombay Irrigation Act.

SECRETARY OF STATE FOR INDIA v. BALYANT GANESH ... (1903) 28 Bom. 105

CANCELLATION—Indian Stamp Act (Act I of 1879), sec. 11—Act II of 1899, sec. 12 (3)—Adhesive stamp.] The mere drawing of two parallel lines without more over a receipt stamp affixed to an instrument does not have the effect of cancelling it "so that it cannot be used again" within the meaning of the Stamp Act.

VIRBHADRAPA v. BHIMJI ... (1904) 28 Bom. 432

CASES—Abdul Gafur v. W. J. Albym (1903) 30 Cal. 713, followed.

See EXECUTION ... 198

Baid Nath Das v. Shamanand Das (1894) 22 Cal. 143, followed.

See SUCCESSION CERTIFICATE ACT ... 630

CASES—(continued).

	Page
<i>Balchand v. Balaram</i> (1903) 5 Bom. L. R. 398, explained. See PROVINCIAL SMALL CAUSE COURTS' ACT	... 244
<i>Bhagchand v. Radhabisan</i> (1903) 28 Bom. 62, followed. See CIVIL PROCEDURE CODE	... 310
<i>Busst v. Gibbons</i> (1861) 30 L. J. Ex. 75, followed. See MALICIOUS PROSECUTION	... 226
<i>Colvin v. Newberry</i> (1832) 1 Cl. and Fin. 283, distinguished. See CHARTER-PARTY	... 573
<i>Dala v. Parag Khushal</i> (1902) 4 Bom. L. R. 797, followed. See BHAGDARI AND NARVDARI ACT	... 399
<i>Dandekar v. Dandekars</i> (1882) 6 Bom. 663, followed. See AWARD	... 287
<i>Dev Gopal v. Vasudev</i> (1887) 12 Bom. 371, followed. See EXECUTION	... 238
<i>Fakirapa v. Rudrapa</i> (1891) 16 Bom. 119, followed. See MISJOINDER OF PARTIES	... 94
<i>Farasram v. Bhimbhai</i> (1903) 5 Bom. L. R. 195, followed. See SPECIFIC RELIEF ACT	... 567
<i>Fatek Chand v. Muhammad Bakhsh</i> (1894) 16 All. 259, not followed. See SUCCESSION CERTIFICATE ACT	... 630
<i>Fry v. Chartered Mercantile Bank of India</i> (1866) L. R. 1 C. P. 689, followed. See CHARTER-PARTY	... 573
<i>Gadadhar Bhat v. Chandrabhagabai</i> (1892) 17 Bom. 690, followed. See HINDU LAW	... 453
<i>Gangoji v. Dhondu</i> (1890) 14 Bom. 450, followed. See EXECUTION	... 238
<i>Gardner v. Trechmann</i> (1884) 15 Q. B. D. 154, followed. See CHARTER-PARTY	... 573
<i>Goodson v. Richardson</i> (1874) L. R. 9 Ch. 221, followed. See INJUNCTION	... 293
<i>Gulabchand Gamnaji v. Moti Chatraji</i> (1900) 25 Bom. 523, distinguished. See SUCCESSION CERTIFICATE ACT	... 344
<i>Gurupadapa v. Irapa</i> (1890) 14 Bom. 558, distinguished. See CIVIL PROCEDURE CODE	... 125
<i>Hansen v. Harrold Brothers</i> (1894) 1 Q. B. 612, followed. See CHARTER-PARTY	... 573
<i>Hari Kamayya v. Hari Venkayya</i> (1903) 26 Mad. 212, followed. See PROVINCIAL SMALL CAUSE COURTS' ACT	... 244
<i>Jugalidas v. Ambashankar</i> (1888) 12 Bom., 501, distinguished. See CONTRACT ACT	... 630
<i>Kanchan Modi v. Baij Nath Singh</i> (1892) 19 Cal. 336, followed. See SUCCESSION CERTIFICATE ACT	... 630
<i>Karalia Nanubhai v. Mansukhram</i> (1900) 24 Bom. 400, explained. See TRANSFER OF PROPERTY ACT	... 466
<i>Lingammal v. Chinna</i> (1882) 6 Mad. 239, distinguished. See MISJOINDER OF PARTIES	... 94
<i>Mahomed Yusuf v. Abdur Rahim</i> (1899) 26 Cal. 839, followed. See SUCCESSION CERTIFICATE ACT	... 630
<i>Malkarjun v. Narhari</i> (1900) 25 Bom. 337, applied. See CIVIL PROCEDURE CODE	... 125

GENERAL INDEX.

xiii

CASES—(continued).

Page

Mohori Bibee v. Dharmodas Ghose (1903) 30 Cal. 539, explained.

See TRANSFER OF PROPERTY ACT... .. 181

Mulchand v. Raji (1883) P. J., p. 184, followed.

See DEKKHAN AGRICULTURISTS' RELIEF ACT 635

Narayandas Ramdas v. Sahab Husein (1888) 12 Bom. 553, referred to.

See MINOR 626

Pandurang v. Bhaskar (1874) 11 Bom. H. C. R. 72, followed.

See PARTITION 201

Rakhmabai v. Radhabai (1868) 5 Bom. H. C. R. 181 (A. C. J.), distinguished.

See HINDU LAW 461

Ratanji v. Sukharam (1884) P. J., p. 68, followed.

See INAMDAR 92

Reed v. Taylor (1812) 4 Taun. 616, followed.

See MALICIOUS PROSECUTION 226

Santaji Khanderao v. Raji (1890) 15 Bom. 105, distinguished.

See SUCCESSION CERTIFICATE ACT 630

Shirjiram v. Waman (1897) 22 Bom., 939, followed.

See LIS PENDENS 361

Small v. Moates (1833) 9 Bing. 574, distinguished

See CHARTER-PARTY 573

Tejpur v. Mahomed Jamal (1896) 20 Bom. 596, distinguished.

See AWARD 287

Udaram v. Ranu (1875) 11. Bom. H. C. R. 76, followed.

See PARTITION 201

Vasanji Haribhai v. Lallu Akhu (1885) 9 Bom. 285, distinguished.

See CIVIL PROCEDURE CODE 125

Venkatesh Khando v. Chanapgavda (1892) 17 Bom. 674, distinguished.

See AWARD 287

CAUSE OF ACTION—*Civil Procedure Code (Act XIV of 1882), sec. 43—Earlier suit on adjusted account—Subsequent suit on a mortgage—Distinct causes of action—Relief not claimed in the earlier suit.* A plaintiff omitted to claim relief in a suit on an adjusted account which he subsequently claimed in a suit based upon a mortgage.

Held, that the causes of action for the two suits being distinct, the omission to claim the relief in the earlier suit did not operate as a bar to the subsequent suit under section 43 of the Civil Procedure Code (Act XIV of 1882).

HANSRAJ LAKHMIDAS v. LALJI ANANDJI (1904) 28 Bom. 447

CERTIFICATE—Collector—Civil Court—Suit to recover share of allowance for particular years—Certificate referring only to some years—Pensions (*Act XXIII of 1871*), sec. 6.

See PENSIONS ACT 241

—Succession Certificate Act (*VII of 1859*), sec. 4—Personal decree—Suit for sale on a mortgage.

See SUCCESSION CERTIFICATE ACT 630

CHARGE—Mortgage—Another debt on a previous khata made payable under the deed.

See MORTGAGE 349

—on land—Inamdar—Arrears of assessment—Occupancytenant—Purchaser from the occupancy tenant—Decree for assessment—Money decree against the occupants.

See INAMDAR 92

CHARTER-PARTY—*Power to sublet*—*Sub-charter*—*Goods shipped under sub-charter and bills of lading authorized by time charter*—*Liability of such goods for lien given by time charter*—*Notice of time charter*—*"Without prejudice to this charter," meaning of*—*Form, construction, and effect of bills of lading*—*Lien for hire of vessel.*] A vessel was chartered by a firm of merchants in Bombay for six months from 20th August, 1898, at a rate of freight which came to Rs. 18,000 a month, payable in advance. By the charter-party the charterers had the option of subletting the vessel, and it was provided that bills of lading were to be signed at any rate of freight the charterers or their agents might direct "without prejudice to this charter," and that the owner was to have "a lien upon all cargoes for freight or charter money due under the charter." On 26th August the vessel was sublet by the charterers to the plaintiff for a sound voyage from Saigon to Reunion and back from Mauritius to Bombay. The vessel completed the voyage and on 2nd February, 1899, arrived at Bombay with sugar put on board by the plaintiff as sub-charterer, at Mauritius, for which he had received bills of lading from the Captain who signed them without obtaining payment of the month's freight then due under the time charter. The freight on the sugar was prepaid at Mauritius by the plaintiff's agents, so that on the arrival of the vessel at Bombay nothing remained to be paid by the plaintiff to the shipowner in respect of the bills of lading freight. Delivery of the sugar was, however, refused, the shipowner claiming a lien on it for the Rs. 18,000 due under the time charter. In a suit against the owner and the Captain of the vessel to recover the sugar, or its value and damages for its detention, the defendants relied on the lien under the time charter, and alleged that the Captain had been induced to sign the bills of lading as he did by misrepresentations of the plaintiff's agents. It was found that the plaintiff knew of the time charter, and the amount of and terms as to the freight, but that there had been no misrepresentation as alleged.

Held, that the Captain was authorized by the time charter to sign the bills of lading and therefore the shipowner had contracted with the plaintiff to carry the sugar on the terms of the bills of lading. *Colvin v. Newberry* (1832) 1 Cl. & Fin. 283; and *Small v. Moates* (1833) 9 Bing. 574, distinguished. The bills of lading were not mere receipts for the goods shipped; they entitled the plaintiff to delivery of the sugar on payment of the freight due on them, notwithstanding that he had notice of the time charter. Such notice had not the effect of incorporating into the bills of lading any terms inconsistent with them and which the Captain was not bound to embody in them.

Fry v. Chartered Mercantile Bank of India (1866) L. R. 1 C. P. 689; and *Gardner v. Trechmann* (1884) 15 Q. B. D. 154, followed.

The words in the time charter "without prejudice to this charter," meant no more than that the rights of the shipowner against the time charterer, and *vice versa*, were to be preserved.

Hansen v. Harrold Brothers (1894) 1 Q. B. 612, followed.

Those words did not override or limit the power of the Captain to issue bills of lading at different rates of freight, or entitle the shipowner to a lien on the goods of persons who had come under no contract with him conferring a lien for the freight, payable under the time charter. A right to seize one person's goods for another person's debt must be clearly and distinctly conferred before a Court of Justice can be expected to recognize it.

Held, therefore (affirming the decision of the High Court on appeal) that the claim of the shipowner to the lien provided by the time charter could not be supported. He was, however, entitled to the benefit of any lien which the time charterer had on the goods of the plaintiff under the sub-charter.

TURNER v. GOOLAM MAHOMED ... (1904) 28 Bom. 573

CIVIL COURT—*Bombay Revenue Jurisdiction Act (X of 1876), sec. 4 (b)*—*Inamdar*—*Occupancy tenant*—*Claim by the Inamdar to recover assessment according*

to the survey rates—*Tenant setting up fixed assessment—Objections under sec. 4 (b)—Jurisdiction.*

See BOMBAY REVENUE JURISDICTION ACT 74

CIVIL COURTS ACT (XIV OF 1869), SEC. 32—*Civil Court—Jurisdiction—Suit against Administrator General*] A suit against the Administrator General as representing the estate of a deceased private individual must be brought in the District Court and not in the Court of a Subordinate Judge, by virtue of section 32 of the Bombay Civil Courts Act (Act XIV of 1869).

ANTONE v. ADMINISTRATOR GENERAL OF BOMBAY ... (1904) 28 Bom. 529

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*Misjoinder of parties—No adverse interest as between the parties—Limitation Act (XV of 1877), sch. II, art. 119—Adoption—Suit to declare validity of adoption—Interference with adopted son, nature of.*] Plaintiff 1, the daughter of Ningangavda, and plaintiff 2, the adopted son of Ningangavda, together brought a suit against the defendants to recover possession of Ningangavda's property. The right alleged in plaintiff 1 was that she had been living with plaintiff 2, in the house of which possession had been given to the first defendant under a decree of the Māmlatdār. The plaint contained no averment asking for relief in favour of plaintiff 1 in the event of plaintiff 2's adoption being found not proved. On an objection having been raised as to misjoinder of parties.

Held, that the suit was not bad for misjoinder of parties, since plaintiff 1, beyond alleging in the plaint that she was Ningangavda's daughter, did not set up her right to recover the property as Ningangavda's daughter, but claimed it with plaintiff 2, on the ground that the latter was Ningangavda's son, and that she lived with him.

Fakirapa v. Rudrapa (1891) 16 Bom. 119, followed, and *Lingammal v. Chinna* (1882) 6 Mad. 239, distinguished.

NINGAWA v. RAMAPPA (1903) 28 Bom. 94

SEC. 13—*Res Judicata—Court competent to try it.*

See RES JUDICATA 338

SEC. 13, EXPLANATION II—*Math Manager—Possessory suit in Māmlatdār's Court in a personal and private capacity—Subsequent civil suit in a representative capacity—Limitation Act (XV of 1877), sch. II, art. 47.*

See LIMITATION ACT 215

SEC. 30—*Gujarāt Talukdār's Act (Dom. Act VI of 1888), sec. 12—Representative order—Partition suit—"Known co-sharers"—All persons interested parties.*] It is a general rule that all persons interested ought to be made parties to a suit, howsoever numerous they may be, so that the Court may be enabled to do complete justice by deciding upon and settling the rights of all persons interested and that the orders of the Court may be safely executed by those who are compelled to obey them and future litigations may be prevented. This rule, no doubt, yields to the exigencies of particular cases and there are well established qualifications to it, such as the power of the Court under section 30 of the Civil Procedure Code (Act XIV of 1882) to make a representative order.

CHUDASAMA SURSANGJI v. PARTAPSANG KHENGARJI ... (1903) 28 Bom. 209

SEC. 43—*Earlier suit on an adjusted account—Subsequent suit on a mortgage—Distinct causes of action—Relief not claimed in the earlier suit.*] A plaintiff omitted to claim relief in a

suit on an adjusted account which he subsequently claimed in a suit based upon a mortgage.

Held, that the causes of action for the two suits being distinct, the omission to claim the relief in the earlier suit did not operate as a bar to the subsequent suit under section 43 of the Civil Procedure Code (Act XIV of 1882).

HANSRAJ LAKHMIDAS v. LALJI ANANDJI ... (1904) 28 Bom. 447

CIVIL PROCEDURE CODE (ACT XIV OF 1882), SECS. 225, 228, 244, 588—

Decree—Execution—Decree passed without jurisdiction—Jurisdiction—Appeal—Practice.] When a decree passed by one Court is sent for execution to another the latter Court is entitled to go into the question whether the first Court had jurisdiction to pass the decree: and if that Court declines to become the executing Court the order so passed is not an order either under section 244 or section 588 of the Civil Procedure Code, and cannot be appealed against.

BHAGWANTAPPA v. VISHWANATH ... (1904) 28 Bom. 378

SEC. 257A—*Decree—Satisfac-*

tion—Sanction of Court—Agreement to pay less than the decretal amount—Void condition in a bond.] On the 4th October 1897, plaintiff obtained a money decree against defendant for Rs. 529-10-0. In full satisfaction of this decree, defendant on the 3rd June, 1898, executed a mortgage-bond, agreeing to pay Rs. 500 within three months from the date of the bond, and in case the sum were not so paid then to pay interest at Re. 1½ per cent. per mensem until payment:

Held, that so far as the bond provided for the payment of Rs. 500 it was valid as it was for the payment of a sum less than the decretal amount, and therefore did not fall within the meaning of paragraph 2 of section 257A of the Civil Procedure Code (Act XIV of 1882).

Held, further, that the agreement to pay interest was void under paragraph 2 of section 257A of the Code.

Held, also, that as the agreement to pay interest after the expiration of three months was a separate agreement, it did not affect the right to sue for recovery of the Rs. 500.

BHAGCHAND v. RADHAKISAN ... (1903) 28 Bom. 62

SEC. 257A—*Decree—Satisfac-*

tion—Sanction of the Court—Hindu Law—Father's debts—Son's liability to pay.] The plaintiff obtained a decree against N for Rs. 350. In satisfaction of this decree, N and his son A, who were living as members of a joint Hindu family, passed two bonds, the one for Rs. 251 and the other for Rs. 99. Both the bonds provided for the payment of interest and no sanction of the Court was obtained to this arrangement.

Held, (1) that the whole agreement was void, as the provision regarding interest carried the sum beyond the decretal amount. The consideration for each bond was the payment of principal with interest, and it existed from the very commencement and formed the basis of the whole contract;

(2) that the bonds were void against N, as well as against A, since N and his son A being members of a joint Hindu family the son was as much liable as his father under the decree.

PER CURIAM:—"The true test, it appears to us, of the application of section 257A is—is it a judgment-debt as to the person executing the agreement, in the sense that it is binding upon him as if he were bound by the decree."

Under Hindu Law the pious obligation of a son to pay his father's debts exists whether the father is living or dead. The mere fact that a father is alive when the decree against him is sought to be executed does not absolve the son from his

liability and entitle him to say that satisfaction of the decree shall not be obtained by selling his interest in the family property. When, however, the decretal debt is tainted by illegality or immorality, the son can contend that the decree is not binding upon him and establish the contention in a separate suit.

GOVIND. v. SAKHARAM ... (1901) 28 Bom. 383

CIVIL PROCEDURE CODE (ACT XIV OF 1882), sec. 257A—*Evidence Act (I of 1872) sec. 92—Execution of decree—Agreement—Khata—Decision on a point not raised by the defendant*] It is not open to a Judge to decide a case in defendant's favour on a point not raised by him with the result that if the decision be upheld it will cast upon the defendant a far higher liability than if he had made the order which the plaintiff had asked for.

* In an execution proceeding the parties arrived at an agreement in satisfaction of the decree. The agreement was in the form of a *khata*. Subsequently the plaintiff brought a suit on the *khata* and claimed interest on the amount in suit. A question having arisen in the suit as to whether the *khata* sued on was enforceable.

Held, allowing the claim for the principal amount only, that if there was an agreement to pay interest then either it was a part of the agreement embodied in the *khata*, or was a separable agreement. If it was a part of the agreement to be embodied in the *khata*, then under section 92 of the Evidence Act (I of 1872) evidence of it was not admissible. If it was a separate agreement, then it would not vitiate the agreement embodied in the *khata*, which apart from the separate oral agreement, could not be open to objection under section 257A of the Civil Procedure Code (Act XIV of 1882).

Bhagchand v. Radhakisan (1903) 28 Bom. 62, followed.

RAICHAND v. NARAN ... (1904) 28 Bom. 310

—SEC. 265—*Execution of decree—Partition by Collector—Objections to the partition—Court's jurisdiction to hear the objections.*

See EXECUTION ... 238

—SEC. 266 (c)—*House—Sale in execution—Exemption from liability to attachment or sale—Facts to be taken to exist which are proved.*] A certain house was sold in execution of a decree. Subsequently the purchaser having brought a suit to recover possession of the house, the defendant, that is, the judgment-debtor under the decree, contended that inasmuch as he was an agriculturist and the house was occupied by him, the materials of it could not be sold having regard to clause (c) of section 266, Civil Procedure Code (Act XIV of 1882).

Held, that the judgment-debtor having never suggested, much less proved, in the execution proceedings that clause (c) of section 266 of the Civil Procedure Code (Act XIV of 1882) had application to the case, the house was liable to be attached and sold and it was not open to him to contend that the Court had no jurisdiction to order the sale of the house by reason of clause (c). Only those facts can be taken to exist which are proved. In the absence of proof the exemption from liability to attachment or sale does not exist for the purposes of execution proceedings. "Strangers to a suit are justified in believing that the Court has done that which by the direction of the Code it ought to do."

Mulkarji v. Narhari (1900) 25 Bom. 337, applied; *Gurnapadapa v. Irappa* (1890) 14 Bom. 558, and *Vasanji Harishai v. Lallu Akhu* (1885) 9 Bom. 285, distinguished.

PANDURANG BALAJI v. KRISHNAJI GOVIND ... (1903) 28 Bom. 125

CIVIL PROCEDURE CODE (ACT XIV OF 1882), SEC. 268—*Decree—Execution—Salary of Railway servant—Disbursing officer outside the jurisdiction of the Court—Prohibitory order—Jurisdiction.*

See EXECUTION 191

SECS. 278—283, 622—*Execution of decree—Order—Appeal—Order passed without jurisdiction—Grounds for non-interference in extraordinary jurisdiction.*] An order passed under section 280 of the Civil Procedure Code (Act XIV of 1882) is not appealable.

Where the order of the lower Appellate Court was passed without jurisdiction the High Court declined to interfere under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) on the ground that the plaintiff, to whom relief was granted by the lower Appellate Court, would, if the application were allowed, be obliged to bring a suit to establish the right which he claimed to the property in dispute, after the expiry of the period of limitation within which he was entitled to bring that suit.

DAYARAM v. GOVARDHANDAS (1904) 28 Bom. 453

SEC. 295—*Rateable distribution—Realization of assets—Interpretation.*] A certain sum of money, which was deposited in a Bank in the joint names of the Collector and a judgment-debtor, and which belonged to the judgment-debtor, was sent by the Collector in the form of a cheque to the Court at the request of the Court to which the judgment-creditor had applied for the payment of his decretal amount out of the said money. After the cheque was received by the Court and converted into cash, the judgment-creditor contended that the money was not liable to rateable distribution under section 295 of the Civil Procedure Code (Act XIV of 1882), between certain other judgment-creditors of the judgment-debtor, because the money did not fall within the description of assets dealt within that section, that is, it could not be said that those assets had been realized, and if they had been realized, they had not been realized in execution of a decree inasmuch as the money had not been attached in the Bank.

Held, that section 295 of the Civil Procedure Code (Act XIV of 1882) applied and that the money was liable to rateable distribution between the several judgment-creditors. Section 295 provides that whenever assets are realized by sale or otherwise in execution of a decree, the consequences prescribed in the section shall follow.

Prima facie the word "realized" means "converted into cash or into a form whereby it becomes available for immediate distribution" and there is nothing in the word itself which requires that that process should take place as the result of any ulterior proceeding in the course of execution.

MANILAL UMEDRAM v. NANABHAI MANEKAL ... (1903) 28 Bom. 264

SECS. 520, 521 AND 526—*Arbitration—Award—Allegations against the award—Refusal to file the award—Objections must be proved to the satisfaction of the Court.*] It is not sufficient merely to allege a cause or ground against the filing of an award such as is indicated in sections 520 and 521 of the Civil Procedure Code (Act XIV of 1882), but the cause or the ground must also be proved to the satisfaction of the Court.

Dandekar v. Dandekars (1882) 6 Bom. 663, followed; *Venkatesh Khandoo v. Chanappavada* (1892) 17 Bom. 674, and *Tejpur v. Mahomed Jamal* (1896) 20 Bom. 596, distinguished.

DHANJIBHAI GIRDHARBHAI v. MATHURBHAI GHELABHAI ... (1903) 28 Bom. 287

SEC. 539—*Atash Behram (Parsi fire-temple)—Parsi community of Udwada—Trusts—Suit—Capacity to hold property—Mandatory injunction—Trespasser.*] In this country a fluctuating body of persons, such as a village community, is capable of owning property.

It is opposed to the notions of the Parsi community that the Iran Shah (sacred fire) should be regarded as capable of, or the subject of, ownership; but even if there be difficulty or doubt as to its ownership, it is obvious that there must be some one entitled to protect from improper invasion the temple property, and those who can predicate of themselves that they have exercised the management, authority and supervision, as alleged in the plaint, are so entitled.

The Parsi inhabitants of Udwada, as the Anjuman (that is, a constituted council or assembly to which all questions regarding their peculiar customs are referred) of that town, are vested with the control, management and supervision of the Atash Behram at that place and all that appertains to it.

A suit for the vindication of the right of management which is vested in, and actually being exercised by, the plaintiffs and those they represent at the date of the obstruction does not fall within section 539 of the Civil Procedure Code (Act XIV of 1882) merely because those who cause the obstruction happen to have been nominated trustees.

A mandatory injunction should not be granted against a trespasser compelling him to come on the land on which he had trespassed to remove an encroachment made thereon by him.

NAVROJI MANEKJI WADIA v. DASTUR KHARSEDJI MAN-
CHERJI

(1903) 28 Bom. 20

CIVIL PROCEDURE CODE (ACT XIV OF 1882), SEC. 592, PROVISIO—*Pauper appeal—Leave—Reasons for granting leave to be recorded.* In granting leave to appeal as pauper the Court should be careful to see that the proviso to section 592 of the Civil Procedure Code (Act XIV of 1882) is satisfied.

The Judge or Bench admitting a pauper appeal should express and record very briefly the reasons for granting leave so that the Bench before whom the appeal ultimately comes may have an assurance that the leave was properly given.

SAKUBAI v. GANPAT

(1904) 28 Bom. 451

CLOG ON THE EQUITY OF REDEMPTION—*Mortgage—Mortgage-debt—Another debt on a previous khata made payable under the deed—Charge.*
See MORTGAGE

COLLECTOR—*Civil Procedure Code (Act XIV of 1882), sec. 265—Execution of decree—Partition by Collector—Objections to the partition—Court's jurisdiction to hear the objections.* Where a decree is sent to the Collector for execution under section 235 of the Civil Procedure Code (Act XIV of 1882), and the Collector contravenes the decretal command of the Court or otherwise acts *ultra vires*, his action is subject to the control and correction of the Court which passed the decree and sent it to him for execution.

Dev Gopal v. Vasudev (1887) 12 Bom. 371, and *Ganoji v. Dhondu* (1890) 14 Bom. 450, followed.

PURUSHOTTAM BHASKAR v. BALKRISHNA PANDURANG

(1903) 28 Bom. 238

COMMON GAMING HOUSE—*Gambling—Bombay Prevention of Gambling Act (Bom. Act IV of 1887), secs. 4, 5, 6, 7—Applicability of presumption under sec. 7 to cases under sec. 4—Warrant under sec. 6—Delay in executing the warrant.*

See GAMBLING

129

COMPENSATION—*Encroachment on Land—Building over a dhora—Injunction—Compensation not proper remedy.*

See INJUNCTION

298

COMPOSITION DEED—*Conveyance—Trustees under the deed—Registration Act (III of 1877), sec. 17 (e).*

See REGISTRATION ACT 361

COMPOUNDING AN OFFENCE—*Agreement to stifle a prosecution—Compounding a non-compoundable offence—Agreement as defence in a Civil Action—Suit for wrongful confinement—Contract Act (IX of 1872), sec. 22.* The plaintiff sued the defendant in damages for wrongful arrest and confinement. The defence pleaded an agreement whereby the parties had agreed to settle their differences in consideration of compounding some criminal charges, one of which was not by law compoundable, and which were then pending between the parties in a Criminal Court. The Lower Appellate Court held that the plaintiff was prevented from bringing the action by reason of the agreement. On appeal—

Held. that the object of the agreement being to stifle a prosecution was bad in law, and that the agreement, therefore, could not be set up as a defence in a Court of Law.

DAISUKHRAM v. CHARLES DEBRETTON ... (1904) 28 Bom. 326

CONSIDERATION—*Contract Act (IX of 1872), secs. 2, 23, 25 and 63—Dispensation or remission—Promise—Contract by Corporation—Executed consideration.*

See CONTRACT ACT 66

CONTRACT—*Proposal with unqualified assent—Mistake in expression—Common mistake—Unilateral mistake—Evidence Act (I of 1872), sec. 92, proviso 1—Contracting party not able to read—Contract differing from that pretended to be read.* It is of the essence of a contract that there should be (expressly or by implication) a proposal to which an unqualified assent has been given: without such assent there is no contract; the minds of the contracting parties are not at one.

Where a contracting party, who cannot read, has a written contract falsely read over to him and the contract written differs from that pretended to be read, the signature on the document is of no force because he never intended to sign and therefore in contemplation of law did not sign the document on which the signature is.

If a person executes a document knowing its contents but misappreciates its legal effect, he cannot deny its execution.

DAGDU v. BHANA ... (1904) 28 Bom. 420

— with minor void—*Refund of money—Specific Relief Act (I of 1877), sec. 41.*

See BOMBAY MINORS' ACT 181

CONTRACT ACT (IX OF 1872), SECS. 2, 23, 25 AND 63—*District Municipal Act (Bom. Act II of 1884), secs. 27 (2), (17) and 30—Municipality—Special general meeting—President—Dispensation or remission—Promise—Contract by Corporation—Executed consideration.* In order that a meeting of the Special General Committee of a District Municipality should be properly constituted, it must be called by the President under section 27 (2) of the District Municipal Act (Bom. Act II of 1884). If the meeting be not so called, the defect is not cured by section 27 (17).

Under section 63 of the Contract Act (IX of 1872) there can be dispensation or remission only by means of a promise. There must be a proposal of the dispensation or remission which is accepted.

Under section 10 of the Contract Act consideration is not an essential of an agreement. In the Act the word "agreement" refers both to "a promise" and a "set of promises forming the consideration for each other."

Though a contract by a Corporation must ordinarily be made under seal, still, where there is that which is known as an executed consideration, an action will lie though this formality has not been observed.

ABAJI SITARAM v. TRIMBAK MUNICIPALITY ... (1903) 28 Bom. 66

CONTRACT ACT (IX OF 1872), SEC. 16—*Amending Act VI of 1899—Fraud—Voidable Contract—Defendant entitled to plead fraud—Lapse of time—Undue influence.*] Fraud does not make a transaction void but only voidable at the instance of the person defrauded.

The plaintiff sued in 1900 to recover from the defendant the amount due for interest on a mortgage bond dated the 15th April, 1893, by sale of the mortgaged property. The defendant contended that he did not execute the bond with free consent and that it was obtained from him under pressure of criminal proceedings.

Held, that the defendant was entitled to resist the claim made against him by pleading fraud, and that he was entitled to urge that plea though he had not brought a suit to set aside the transaction.

Held, further, that under the circumstances he was not precluded from urging that plea by lapse of time : *Jagaldas v. Ambashankar* (1888) 12 Bom. 501, distinguished.

RANGNATH SAKHARAM v. GOVIND NARSIN ... (1904) 28 Bom. 639

SEC. 6—*Mortgage—Each case to be decided by its own circumstances*] *Held*, that the principles of justice, equity and good conscience do not of necessity disentitle a mortgagee from insisting on his security for a greater sum than what has been actually advanced: in each case the question must be asked whether there has or has not been a hard and unfair bargain on the borrower, but when that is not established against the mortgagee then the right to redeem still remains, though it is redeeming not on payment of the sum advanced, but of the sum which the parties agreed it was worth the mortgagor's while 'to pay in order to get a smaller advance when he was in want of money.

Each case must be determined according to its own circumstances.

HARI v. RAMJI ... (1904) 28 Bom. 371

SEC. 23—*Agreement to stifle a prosecution—Compounding a non-compoundable offence—Agreement as defence in a civil action—Suit for wrongful confinement.*] The plaintiff sued the defendant in damages for wrongful arrest and confinement. The defence pleaded an agreement whereby the parties had agreed to settle their differences in consideration of compounding some criminal charges, one of which was not by law compoundable and which were then pending between the parties in a Criminal Court. The lower Appellate Court held that the plaintiff was prevented from bringing the action by reason of the agreement. On appeal—

Held, that the object of the agreement being to stifle a prosecution was bad in law, and that the agreement, therefore, could not be set up as a defence in a Court of Law.

DAISUKHRAH v. CHARLES DEBRETTON ... (1904) 28 Bom. 326

SEC. 30—*Wagering Contracts.*] In order that a transaction may fall within section 30 of the Indian Contract Act, there must be at least two parties, the agreement between whom must be by way of wager, and both sides must be parties to the wager.

It is of the essence of a wager that each side should stand to win or lose, according to the uncertain or unascertained event, in reference to which the chance or risk is taken; in other words, to make an agreement a wager there must be a common intention to bet.

SASSOON v. TOKESEY ... (1904) 28 Bom. 616

CONTRADICTORY STATEMENTS— <i>Perjury—Power of the High Court to interfere in revisional jurisdiction—Criminal Procedure Code (Act V of 1898), secs. 435, 439—Indian Penal Code (Act XLV of 1860), sec. 193.</i> In the case of perjury arising out of contradictory statements the Court dealing with them should not convict unless fully satisfied that the statements are from every point of view irreconcilable, and if the contradiction consists in two statements opposed to each other as to matters of inference or opinion on which a man may take one view at one time and a contrary view at another, there can be no perjury, unless on oath he has stated facts on which his first statement was based and then denied those facts on oath on a subsequent occasion.	
EMPEROR v. BĀNKATRAM LACHIRAM	... (1904) 28 Bom. 533
CONTRIBUTION— <i>Partnership—Dissolution of partnership—Appointment of Receiver—Debt of the firm—Decree against one partner—Satisfaction of the decree by the partner.</i>	
See PARTNERSHIP	... 176
CONVEYANCE— <i>Composition deed—Trustees under the deed—Registration Act (III of 1877), sec. 17 (e).</i>	
See REGISTRATION ACT	... 364
COPY OF JUDGMENT— <i>Limitation—Appeal—Act XV of 1877, sec. 12, art. 151—Practice.</i>	
See LIMITATION ACT	... 643
CORPORATION, contract by— <i>Contract Act (IX of 1872), secs. 2, 23, 25 and 63—Municipality—Dispensation or remission—Promise—Executed consideration.</i>	
See CONTRACT ACT	... 66
CORROBORATION— <i>Accounts—Evidence Act (I of 1872), secs. 32 (2), 34.</i>	
See EVIDENCE ACT	... 294
COURT OF COMPETENT JURISDICTION— <i>Res Judicata—Civil Procedure Code (Act XIV of 1882), sec. 13.</i>	
See RES JUDICATA	... 338
COURT-SALE— <i>Purchase at a Court-sale under another decree—Mortgage-decree—Pendency of the execution proceedings—Lis pendens.</i>	
See LIS PENDENS	... 361
CO-WIDOW— <i>Estate vested in one co-widow by inheritance from her son—Adoption by the other co-widow—Hindu Law.</i>	
See HINDU LAW	... 461
CRIMINAL PROCEDURE CODE (ACT V OF 1898), SECS. 303, 304— <i>Judge—Jury—Misunderstanding the law—Verdict mistaken or ambiguous—Powers of the Judge to question the Jury.</i>	
See JURY	... 412
SEC. 342— <i>Keeping a common gaming house—Warrant under sec. 6 of Bombay Prevention of Gambling Act (Bom. Act IV of 1887)—Delay in executing the warrant—Previous conviction.</i>	
See GAMBLING	... 129
SECS. 435, 439— <i>Intentionally giving false evidence in a judicial proceeding—Absence of discussion of evidence for the defence—Explaining away the statement of the accused to his prejudice—Assignment of perjury—Proof—Misreading of documentary evidence—Fundamental errors in principle—Revisional jurisdiction—Indian Penal Code (Act XLV of 1860), sec. 193.</i>	
See PERJURY	... 479

GENERAL INDEX.

xxiii

Page

CRIMINAL PROCEDURE CODE (ACT V OF 1898), SECS. 435, 439—*Perjury—Contradictory statements—Penal Code (Act XLV of 1860), sec. 193—Power of the High Court to interfere in revisional jurisdiction.*

See FALSE EVIDENCE ...

DAMAGE—Trenches for foundation—Percolation of rain water through the trenches— ... 533

Injury to the neighbouring house.] The defendant dug a trench on his land for the foundation of a superstructure on his land. This trench was close to, and in a line with, the back wall of the plaintiff's house. The rain-water collected in the trench and percolating into the foundations of the plaintiff's house, caused the back wall of the plaintiff's house to subside and caused other damage. The plaintiff brought a suit to recover damages.

Held, (1) that the defendant had a right to build on his land and for the purpose of building to make ditches for foundations;

(2) that the effective cause of the damage being the percolation of the rain-water which collected in the trenches and caused the shrinkage of the house, the defendant was not liable.

Before a person can be held liable in damages for injury caused to his neighbour's land by water either flowing from the former's land to the latter's or percolating from the one into the other, it must be shown that the water was brought or collected on his land by him voluntarily for his own purposes in a non-natural user of it. Otherwise, he is not liable.

MOHOLAL v. BAI JIVKORE ...

DEBTS—Payment of money in Court—Succession Certificate Act (VII of 1889)— ... (1904) 23 Bom. 472

Enquiry under the Act—Certificate in respect of the money so paid—Practice.

See SUCCESSION CERTIFICATE ACT ...

—Surety—Grandson's liability to pay debts contracted by the grandfather as a surety—Mitakshara—Hindu Law. ... 119

See HINDU LAW ...

DECLARATORY DECREE—Omission to seek further relief—Specific Relief Act (I of 1877), sec. 42. ... 408

See SPECIFIC RELIEF ACT ...

DECLARATORY SUIT—Declaration—Further relief—Court—Jurisdiction— ... 332

Specific Relief Act (I of 1877), sec. 42.

See SPECIFIC RELIEF ACT ...

DECREE—Execution—Claim of interest not provided by the decree—Acquiescence. ... 567

A mortgage decree ordered payment of Rs. 1,415-10-6 before March, 1886, but contained no provision as to interest. In execution of this decree the defendant presented several applications (*darkhasts*), the last of which was in 1898, whereby he sought to recover Rs. 2,570-4-5 as principal and interest and in default to have the amount realized by sale of the property. On the 2nd March, and again on the 7th August, 1900, the judgment-debtor got the sale postponed, saying that he would satisfy the decree. On the 12th October, 1900, the plaintiff again asked for extension of time to enable him to pay the debt and interest also. On the 29th July and the 17th August, the plaintiff obtained further extensions, but was not able to satisfy the decree. At last, on the 20th September, 1902, he (plaintiff) for the first time disputed the right of the defendant to claim interest on the ground that the decree did not award any.

PER CURIAM.—The plaintiff's application of the 12th October, 1900, contained a distinct promise to pay interest. ... rightly or wrongly he represented to the Court that he was liable to pay interest as claimed in the *darkhast*, promised to pay it, and on the strength of that representation and promise he

obtained from the Court adjournments from time to time. He must be treated as having contracted an obligation to pay interest on the decretal amount from the 12th October, 1900.

NARAYAN v. RAOJI

(1904) 28 Bom. 393

DECREE—Execution—Decree passed without jurisdiction—Jurisdiction—Appeal—Civil Procedure Code (Act XIV of 1882), secs. 225, 228, 244, 583.

See EXECUTION

378

Execution of decree—Agreement—Khata—Civil Procedure Code (Act XIV of 1882), sec. 257A.

See CIVIL PROCEDURE CODE

310

Rateable distribution—Realization of assets—Interpretation—Civil Procedure Code (Act XIV of 1882), sec. 295.

See CIVIL PROCEDURE CODE

264

Satisfaction—Civil Procedure Code (Act XIV of 1882), sec. 257A—Sanction of Court—Agreement to pay less than the decretal amount—Void condition in a bond.

See CIVIL PROCEDURE CODE

62

Satisfaction—Sanction of the Court—Civil Procedure Code (Act XIV of 1882), sec. 257A.

See CIVIL PROCEDURE CODE

383

DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879). CHAP. II—*Suit based on dispossession of an existing possession—Incidental reference to a mortgage in plaint.* A suit based on a dispossession of an existing possession does not fall within Chapter II of the Dekkhan Agriculturists' Relief Act (Act XVII of 1879). An incidental reference to a mortgage in the plaint does not affect the question when the suit is one to recover possession from a person who is not the mortgagor.

Mulchand v. Ravji (1883) P. J., p. 184, followed.

KRISHNAJI v. HARI

(1904) 28 Bom. 635

DISPENSATION of a contract—Contract Act (IX of 1872), secs. 2, 23, 25 and 63—Remission—Promise—Contract by Corporation—Executed consideration.

See CONTRACT ACT

66

DISSOLUTION OF PARTNERSHIP—Partnership—Appointment of Receiver—Debt of the firm—Decree against one partner—Satisfaction of the decree by the partner—Suit by the partner against his co-partners for contribution—Court—Practice and procedure.

See PARTNERSHIP

176

DISTRICT MUNICIPAL ACT (BOMBAY ACT II OF 1884), SECS. 27 (2), (17) AND 30—Municipality—Special general meeting—President—Dispensation or remission—Promise—Contract by Corporation—Executed consideration.

See MUNICIPALITY

46

DUTY—Negligence in performance of duty towards plaintiff—Non-feasance—The Bombay District Municipal Act (Bom. Act III of 1911).

See BOMBAY DISTRICT MUNICIPAL ACT

340

EASEMENT—Ownership of soil—Encroachment by protrusion of beams—Mandatory injunction.] Plaintiff's beams overhung defendant's soil and defendant erected

GENERAL INDEX.

xxv

a building which overhung those beams. A question having arisen as to whether the beams gave the plaintiff a right to the column of air above them.	Page
<i>Held</i> , that the defendant being the owner of the soil, was entitled <i>prima facie</i> to all above it and the diminution in his rights by reason of the beams did not extend beyond the protrusion of the beams themselves.	
RANCHOD SHAMJI v. ABDULABHAI MITHABHAI	(1904) 28 Bom. 428
EAST INDIA COMPANY—Secretary of State in Council—Negligence of Chief Constable—Suit to recover damages—"Liabilities lawfully contracted and incurred"—Statute 21 and 22 Vict., c. 106, secs. 41, 42 and 65—Construction.	
See SECRETARY OF STATE	...
ENCROACHMENT by protrusion of beams—Ownership of soil—Easement—Mandatory injunction.	... 314
See EASEMENT	...
ENLARGEMENT OF TIME—Transfer of Property Act (IV of 1882), sec. 93—Redemption decree—Failure to pay money on date fixed—Court's power to enlarge time for payment.	... 428
See TRANSFER OF PROPERTY ACT	...
EQUITY OF REDEMPTION—Mortgage—Mortgage-debt—Another debt on a previous khata made payable under the deed—Charge.	... 102
See MORTGAGE	...
—Prior mortgagee—Subsequent mortgagee—Rights to redeem inter se—Foreclosure decree—Transfer of Property Act (IV of 1882), secs. 75, 85, 86, 91.	... 349
See REDEMPTION	...
—Redemption suit—Mortgage by persons other than the real owner—Mortgagee's possession adverse to the real owner.	... 155
See ADVERSE POSSESSION	...
ESCHEAT—Inamdar—Dasname Sanyasi and Gosavi Zundivale—Kadim (ancient) haks—Corporate body—Fluctuating communities—Duty of the Court, if possible, to find legal origin of existing facts.	... 87
See INÁMBÁR	...
ESTOPPEL—Decree—Execution—Claim of interest not provided by the decree—Acquiescence.	... 276
See DECREE	...
—Evidence Act (I of 1872), sec. 115—Adverse possession:—Bhagdari and Narwadari Act (Bom. Act V of 1862), secs. 3, 5.	... 393
See BHAGDARI AND NARWADARI ACT	...
—Indian Evidence Act (I of 1872), sec. 115—Acquiescence—Question of legal inference—Plea of estoppel appearing for the first time in issues in appeal. Acquiescence is not a question of fact, but of legal inference from facts found. This principle applies also to estoppel.	... 390
To create an estoppel it is not sufficient to say that it may well be doubted whether the plaintiff would have acted in the way he did but for the way in which the defendants had acted. It must be found that the plaintiff would not have acted as he did. It must be found that the defendants by their "declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief."	

A plea of estoppel should not be given effect to in appeal when it was not suggested in the written statement, nor made one of the issues, in the first Court, nor one of the grounds of appeal, and only appears for the first time in the issues raised by the lower Appellate Court. In such a case the High Court can interfere in second appeal.

NARSINGDAS v. RAHIMANBHAI ... (1904) 28 Bom. 440

ESTOPPEL—*Redemption suit—Mortgage by persons other than the real owner—Acquiescence of the real owner—Mortgagee's possession adverse to the real owner.*

See ADVERSE POSSESSION ... 87

EVIDENCE ACT (I OF 1872)—*Indian Penal Code (Act XLV of 1860), sec. 193—Criminal Procedure Code (Act V of 1898), secs. 435, 439—Intentionally giving false evidence in a judicial proceeding—Absence of discussion of evidence for the defence—Explaining away the statement of the accused to his prejudice—Assignment of perjury—Proof—Misreading of documentary evidence—Fundamental errors in principle.* The Indian Evidence Act (I of 1872) does not provide that there must be corroboration to support a conviction, but in ordinary cases and where the provisions peculiar to Indian Law do not apply, a rule which is founded on substantial justice may well serve as a safe guide to those who have to administer the criminal law in India.

EMPEROR v. BAL GANGADHAR TILAK ... (1904) 28 Bom. 479

SECS. 11, 54—*Bombay Prevention of Gambling Act (Bom. Act IV of 1887), secs. 4, 5, 6, 7—Keeping a common gaming-house—Applicability of presumption under sec. 7 to cases under sec. 4—Previous conviction—Criminal Procedure Code (Act V of 1898), sec. 312.* Held, that the evidence that the accused had been previously convicted of the same offence was admissible to show guilty knowledge or intention.

EMPEROR v. ALLOOMIYA HUSAN ... (1903) 28 Bom. 129

SECS. 32 (2), 34—*Accounts—Corroboration.* The plaintiff relied on entries in the handwriting of her deceased husband kept in the ordinary course of his business.

Held, that entries in accounts relevant only under section 34 of the Indian Evidence Act (I of 1872) are not alone sufficient to charge any person with liability: corroboration is required; but where accounts are relevant also under section 32 (2), they are in law sufficient evidence in themselves, and the law does not, as in the case of accounts admissible only under section 34, require corroboration. Entries in accounts may in the same suit be relevant under both sections, and where that is so, it is clear that inasmuch as they are relevant under section 32 (2), the necessity of corroboration prescribed by section 34 does not arise.

Though accounts which are relevant under section 32 (2) do not as a matter of law require corroboration, the Judge is not bound to believe them without corroboration; that is a matter on which he must exercise his own judicial discretion as a Judge of fact.

RAMPYABAI v. BALAJI SHRIDHAR ... (1904) 28 Bom. 291

SEC. 47—*Document—Handwriting—Proof—Witness proving handwriting.* In proof of a document a witness stated that he was acquainted with the handwriting of the writer, but he was not asked in examination-in-chief any question which would elicit any of the several matters indicated in the explanation to section 47 of the Indian Evidence Act (I of 1872). The witness was not cross-examined on the point.

Held, that the law on the point is correctly stated in Taylor on Evidence to be as follows:—

GENERAL INDEX.

xxvii

"A witness need not state in the first instance how he knows the handwriting, since it is the duty of the opposite party to explore on cross-examination the sources of his knowledge, if he be dissatisfied with the testimony as it stands."

Page

It is within the power of the presiding Judge and often may be desirable to permit the opposing advocate to intervene and cross-examine so that the Court may at that stage be in a position to come to definite conclusion on adequate materials as to the proof of the handwriting.

SHANKARRAO v. RAMJI

EVIDENCE ACT (I OF 1872), SEC. 92—*Agreement—Khata—Execution of decree.* ... (1903) 28 Bom. 58
See CIVIL PROCEDURE CODE ... 310

SEC. 92, PROVISIO 1—*Existence of mistake—Ad-*
mission of oral evidence.

See CONTRACT ...

SEC. 115—*Estoppel.*

See BHAGDARI AND NARWADARI ACT

SEC. 115—*Estoppel, requirements of—Acquiescence* ... 399

—*Question of legal inference—Plea of estoppel appearing for the first time in issues in appeal.* Acquiescence is not a question of fact, but of legal inference from facts found. This principle applies also to estoppel.

To create an estoppel it is not sufficient to say that it may well be doubted whether the plaintiff would have acted in the way he did but for the way in which the defendants had acted. It must be found that the plaintiff would not have acted as he did. It must be found that the defendants by their "declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief."

A plea of estoppel should not be given effect to in appeal when it was not suggested in the written statement, nor made one of the issues in the first Court, nor one of the grounds of appeal and only appears for the first time in the issues raised by the lower Appellate Court. In such a case the High Court can interfere in second appeal.

NARSINGDAS v. RAHIMANBAI

EXECUTED CONSIDERATION—*Contract Act (IX of 1872), secs. 2, 23, 25 and* ... (1904) 28 Bom. 440

63—*Dispensation or remission—Promise—Contract by Corporation.*

See CONTRACT ACT

EXECUTION—*Application for execution—Civil Procedure Code (Act XIV of 1882),* ... 66
sec. 248—*Notice—Date of the order—Limitation Act (XV of 1877), sch. II, art.*
179, cl. 5.

See LIMITATION Act

Civil Procedure Code (Act XIV of 1882), secs. 225, 228, 244, 588—

Decree—Decree passed without jurisdiction—Jurisdiction—Appeal—Practice. When a decree passed by one Court is sent for execution to another the latter Court is entitled to go into the question whether the first Court had jurisdiction to pass the decree: and if that Court declines to become the executing Court the order so passed is not an order either under section 244 or section 588 of the Civil Procedure Code, and cannot be appealed against.

BHAGWANTAPPA v. VISHWANATH

... (1904) 28 Bom. 378

Civil Procedure Code (Act XIV of 1882), sec. 265—*Partition by Collector—Objections to the partition—Court's jurisdiction to hear the objections.* Where a decree is sent to the Collector for execution under section 265 of the

Civil Procedure Code (Act XIV of 1882), and the Collector contravenes the decretal command of the Court or otherwise acts *ultra vires*, his action is subject to the control and correction of the Court which passed the decree and sent it to him for execution.

Dev Gopal v. Vasudev (1887) 12 Bom. 371 and *Ganaji v. Dhondur* (1890) 14 Bom. 450, followed

PURUSHOTTAM BHASKAR v. BALKRISHNA PANDURANG ... (1903) 28 Bom. 236

EXECUTION—*Civil Procedure Code (Act XIV of 1882), sec. 266 (c)—House—Sale in execution—Exemption from liability to attachment or sale.*

See CIVIL PROCEDURE CODE 125

—*Civil Procedure Code (Act XIV of 1882), sec. 268—Decree—Salary of Railway servant—Disbursing officer outside the jurisdiction of the Court—Prohibitory order—Jurisdiction.*] The judgment-debtor, a railway servant, resided within the local limits of the jurisdiction of the Small Cause Court at Bhusaval, which passed the decree. The disbursing officer of the Railway Company resided at Bombay, outside its jurisdiction; but the salary was every month paid to the judgment-debtor at Bhusaval by the disbursing officer, through his subordinate. The Court at Bhusaval issued to the disbursing officer a prohibitory order, under section 268 of the Civil Procedure Code (Act XIV of 1882), against the salary of the judgment-debtor.

Held, that the Court at Bhusaval had no jurisdiction to attach the salary of the judgment-debtor by a prohibitory order issued to the disbursing officer under section 268 of the Civil Procedure Code (Act XIV of 1882).

Abdul Gufur v. W. J. Albyn (1903) 30 Cal. 718, followed.

SAYADKHAN v. B. S. DAVIES (1903) 28 Bom. 198

—*Civil Procedure Code (Act XIV of 1882), sec. 295—Rateable distribution—Realization of assets—Interpretation.*

See CIVIL PROCEDURE CODE 264

—*Decree—Claim of interest not provided by the decree—Acquiescence*

See DECREE 303

—*Order—Appeal—Order passed without jurisdiction—Grounds for non-interference in extraordinary jurisdiction—Civil Procedure Code (Act XIV of 1882), secs. 278—283, 622.*

See CIVIL PROCEDURE CODE 458

EXTRAORDINARY JURISDICTION—*Execution of decree—Order—Appeal—Order passed without jurisdiction—Grounds for non-interference in extraordinary jurisdiction.*] Where the order of the lower Appellate Court was passed without jurisdiction the High Court declined to interfere under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) on the ground that the plaintiff, to whom relief was granted by the lower Appellate Court, would, if the application were allowed, be obliged to bring a suit to establish the right which he claimed to the property in dispute, after the expiry of the period of limitation within which he was entitled to bring that suit.

DAYARAM v. GOVARDEHANDAS (1904) 28 Bom. 458

FALSE EVIDENCE—*Absence of discussion of evidence for the defence—Explaining away the statement of the accused to his prejudice—Assignment of perjury—Proof—Misreading of documentary evidence—Fundamental errors in principle—Revisional jurisdiction—Criminal Procedure Code (Act V of 1898), secs. 435, 439—Indian Penal Code (Act XLV of 1860), sec. 193.*

See PERJURY 479

FALSE EVIDENCE—*Indian Penal Code (Act XLV of 1860), sec. 193—Criminal Procedure Code (Act V of 1898), sec. 435, 439—Perjury—Contradictory statements—Power of the High Court to interfere in revisional jurisdiction.* Where the accused was convicted and sentenced under section 193 of the Indian Penal Code (Act XLV of 1860) of giving false evidence in a judicial proceeding and where the charge was based on the allegation that in two depositions, one given on the 3rd December, 1896, and the other on the 23rd March, 1901, the accused had made two contradictory statements, and the case for the prosecution was that on that ground, though it could not be proved which of the alleged contradictory statements was false, the accused's conviction should be upheld,

Held, (by *Jenkins, C. J.*, reversing the conviction and setting aside the sentence in revisional jurisdiction,) that to convict an accused of giving false evidence, it is necessary to show not only that he has made a statement which is false, but that he also either knew or believed it to be false or did not believe it to be true.

Where it is sought to establish guilt solely on contradictory statements, although the Court "may believe that on the one or the other occasion the prisoner swore what was not true, it is not a necessary consequence that he committed perjury; for there are cases in which a person might very honestly and conscientiously swear to a particular fact from the best of his recollection and belief and from other circumstances at a subsequent time be convinced that he was wrong and swear to the reverse without meaning to swear falsely either time."

Where the conviction is based on merely the statements contained in the charge without examining the whole of the depositions, the conviction is an error of law.

Where the conviction of the accused for perjury in such a case was sustained by additional evidence, namely, the statements of the brother of the accused not made on oath at the trial of the case,

Held, that the statements were inadmissible and, if relied on, would vitiate the judgment.

The admission in evidence of a statement made by the accused having no real bearing on the case but showing only at the most that the accused in other matters had been untruthful, would be highly improper.

The controlling power of the High Court "is a discretionary power, and it must be exercised with regard to all the circumstances of each particular case, anxious attention being given to the said circumstances which vary greatly. This discretion ought not to be crystallized, as it would become in course of time, by one Judge, attempting to prescribe definite rules with a view to bind other Judges in the exercise of the discretion which the Legislature has committed to them. This discretion, like all other judicial discretions, ought, as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case."

PER CHANDAVARKAR, J.—In the case of perjury arising out of contradictory statements the Court dealing with them should not convict unless fully satisfied that the statements are from every point of view irreconcilable, and if the contradiction consists in two statements opposed to each other as to matters of inference or opinion on which a man may take one view at one time and a contrary view at another, there can be no perjury, unless on oath he has stated facts on which his first statement was based and then denied those facts on oath on a subsequent occasion.

Where the sole and whole question is—are the statements forming the subject of the charge so contrary that one or the other of them must be necessarily false?—the answer to that question depends upon the construction to be put upon the two depositions from which the statements are taken and their construction, as indeed the construction of any document, is a question of law, not of fact.

It is not correct to say that the law as laid down in the Criminal Procedure Code (Act V of 1898) gives the High Court no power to go into evidence in revision. The Bombay High Court has, as a matter of practice, held that it will not go into evidence as a rule, but will interfere only under special circumstances, or where there is an error of law.

The accused in a criminal case is merely on the defensive and, unless there is any positive admission of a fact by him, any omission on his part to explain what indeed can be explained without his explanation should not be pressed against him.

PER ASTON, J. (contra):—The rule of practice is that the High Court ordinarily refrains from opening questions of fact, when no appeal lies, except on some ground of law and in order to remedy a clear miscarriage of justice.

Where the question before High Court exercising its powers of revision under section 439 of the Criminal Procedure Code (Act V of 1898) is one of appreciation of evidence, the rule of practice adopted is to refuse to disturb a conviction when there is legal evidence, oral or documentary, to sustain it.

"Under the law of British India, it is not necessary that the charge should allege which of two contradictory statements upon oath is false, but it is sufficient (unless indeed some satisfactory explanation of the contradiction should be established) to warrant a conviction of the offence of giving false evidence to show that an accused person has made one statement upon oath at one time and directly contradictory statement at another." It is not the duty of the Court of first instance (and far less of a Court of appeal or revision) to supply *ab extra* an explanation which the accused himself has not suggested or an intention or knowledge which the accused has not claimed.

EMPEROR v. BANKATRAM LACHIRAH ... (1904) 28 Bom. 533

FRAUD—*Voidable contract—Defendant entitled to plead fraud—Lapse of time—Undue influence—Contract Act (IX of 1872), sec. 16.* Fraud does not make a transaction void but only voidable at the instance of the person defrauded.

The plaintiff sued in 1900 to recover from the defendant the amount due for interest on a mortgage-bond dated the 15th April, 1893, by sale of the mortgaged property. The defendant contended that he did not execute the bond with free consent and that it was obtained from him under pressure of criminal proceedings.

Held, that the defendant was entitled to resist the claim made against him by pleading fraud, and that he was entitled to urge that plea though he had not brought a suit to set aside the transaction.

RANGNATH SAKHARAM v. GOVIND NARSING ... (1904) 28 Bom. 689

FURTHER RELIEF—*Declaratory suit—Declaration—Court—Jurisdiction—Specific Relief Act (I of 1877), sec. 42.*

See SPECIFIC RELIEF ACT ... 307

GAMBLING—*Bombay Prevention of Gambling Act (Bom. Act IV of 1887), secs. 4, 5, 6, 7—Keeping a common gaming house—Applicability of presumption under sec. 7 to cases under sec. 4—Warrant under sec. 6—Delay in executing the warrant—Previous conviction—Criminal Procedure Code (Act V of 1898), sec. 342—Evidence Act (Act I of 1872), secs. 11, 54.* On the 19th May, 1903, a warrant was issued by the Commissioner of Police at Bombay, under section 6 of the Bombay Prevention of Gambling Act (Bom. Act IV of 1887), for the arrest of accused 1. In execution of this warrant, when, on the 7th June, 1903, the police entered the room of accused 1, no actual play was seen by the raiding party, but there were found playing cards on the ground and ten persons, including accused 1, were found sitting in a circle. Upon these facts the Magistrate convicted the accused of keeping a common gaming house, an offence under section 4

of the Bombay Prevention of Gambling Act (Bom. Act IV of 1887), by applying to him the presumption created by section 7 of the Act; and taking into consideration the previous convictions of the accused under the Act, he sentenced him to pay a fine of Rs. 500, the maximum amount of fine allowed by the section. On appeal to the High Court,

Held, by Chandavarkar and Aston, J.J. (Jacob, J., dissenting), affirming the conviction, (1) that the presumption created by section 7 of the Bombay Prevention of Gambling Act (Bom. Act IV of 1887) could be applied to cases falling under section 5 as well as to those falling within the purview of section 4 of the Act.

(2) That the applicability of section 7 of the Bombay Prevention of Gambling Act (Bom. Act IV of 1887) was affected by the fact that a considerable interval had elapsed between the issue of a warrant under section 6 of the Act and the execution thereof:

(3) That the evidence that the accused had been previously convicted of the same offence was admissible to show guilty knowledge or intention.

Held, by Jacob, J., dissenting, (1) that the presumption created by section 7 of the Bombay Prevention of Gambling Act (Bom. Act IV of 1887) is sufficient for the purposes of section 5 of the Act. It is also sufficient for the purposes of section 4 (a) so far as regards the fact that the house, &c., is so used, but it is not alone sufficient for the purpose of showing that the house was so kept or used by any specified person.

(2) That in a trial for an offence under section 4 (a) of the Bombay Prevention of Gambling Act (Bom. Act IV of 1887), the evidence that the accused was previously convicted of a similar offence cannot be admitted either under section 54 or section 11 of the Evidence Act (I of 1872).

(3) That the question whether the delay, between the issue of a warrant under section 6 of the Act and its execution, has been reasonable or otherwise is one which must be decided with reference to the circumstances of each case.

EMPEROR v. ALLOOMIYA HUSAN ... (1908) 28 Bom. 129

GUARDIAN AD LITEM—*Minor*—*Nazir*—*Court's power to relieve*.

See MINOR ...

GUARDIAN AND WARDS ACT (VIII OF 1890), SEC. 27—*Minor*—*Guardian*—

Succession Certificate—*Succession Certificate Act* (VII of 1889), sec. 6, cl. (d).

See SUCCESSION CERTIFICATE ACT ...

... 844

GUJARAT TALUKDARS' ACT (BOM. ACT VI OF 1888), SEC. 12—*Representative order*—*Partition suit*—*"Known co-sharers"*—*All persons interested parties*.

See JOINDER OF PARTIES ...

... 209

HANDWRITING, *Witnesses deposing to the identity of*—*Document*—*Proof*—*Evidence Act* (I of 1872), sec. 47.] In proof of a document a witness stated that he was acquainted with the handwriting of the writer, but he was not asked in examination-in-chief any question which would elicit any of the several matters indicated in the explanation to section 47 of the Indian Evidence Act (I of 1872). The witness was not cross-examined on the point.

Held that the law on the point is correctly stated in Taylor on Evidence to be as follows:—

"A witness need not state in the first instance how he knows the handwriting, since it is the duty of the opposite party to explore on cross-examination the sources of his knowledge, if he be dissatisfied with the testimony as it stands."

It is within the power of the presiding Judge and often may be desirable to permit the opposing advocate to intervene and cross-examine so that the Court

may at that stage be in a position to come to definite conclusion on adequate materials as to the proof of the handwriting.

SHANKARRAO v. RAMJI ... (1903) 28 Bom. 58

HIGH COURT RULE 195—Witness—Application in Chambers—Expenses for attendance in Court] A witness who attends the Court on a subpoena is entitled to demand at any time his reasonable expenses of such attendance from the party issuing the subpoena even though he only gives evidence as a witness for a party to the suit other than the party summoning him.

IN RE BULLOCK ... (1904) 28 Bom. 647

HINDU LAW—Adoption—Co-widows—Estate vested in one co-widow by inheritance from her son—Adoption by the other co-widow.] A co-widow cannot make an adoption without the consent of the other co-widow in whom by inheritance from her son the whole estate had become vested.

Rakhmabai v. Radhabai (1868) 5 Bom. H. C. R. (A. C. J.) 181, distinguished.

Semle, the consent of the other co-widow would not valid to the adoption.

ANANDIBAI v. KASHIBAI ... (1904) 28 Bom. 461

Dharwar district—Succession—Sister—Brother's widow.] In the district of Dhárwar a sister is preferred as an heir to a brother's widow.

RUDRAPA v. LEAVA ... (1903) 28 Bom. 82

Father's debts—Son's liability to pay.] Under Hindu Law the pious obligation of a son to pay his father's debts exists whether the father is living or dead. The mere fact that a father is alive when the decree against him is sought to be executed does not absolve the son from his liability and entitle him to say that satisfaction of the decree shall not be obtained by selling his interest in the family property. When, however, the decretal debt is tainted by illegality or immorality, the son can contend that the decree is not binding upon him and establish the contention in a separate suit.

GOVIND v. SAKHARAM ... (1904) 28 Bom. 383

Gujarát—Father's father's sister's grandson—Mother's sister's son preferential heir—Moveables inherited by widow—Testamentary power of disposition—Mayukha.] In Gujarát a mother's sister's son is the preferential heir to a father's father's sister's grandson.

Under the Mayukha a widow has no testamentary power of disposition over moveables which have been inherited by her from her husband.

Gadadhar Bhat v. Chandrabhagabai (1892) 17 Bom. 690, followed.

CHAMANLAL v. GANESH MOTICHAND ... (1904) 28 Bom. 453

Mitákshara—Debts—Surety—Grandson's liability to pay debts contracted by the grandfather as a surety.] Under Hindu Law as laid down in the *Mitákshara* a grandson is not liable to pay a debt which his grandfather contracted as a surety unless the latter in accepting the liability of a surety received some consideration for it.

A party is not bound, generally speaking, by a pleader's admission in argument on what is a pure question of law amounting to no more than his view that the question is unarguable.

NABAYAN v. VENKATACHARYA ... (1904) 28 Bom. 408

Partition—Joint property—Minor coparceners—Guardian's defaultations respecting joint property—Minor's share.

See PARTITION ... 330

HINDU LAW—*Right to sue on behalf of coparceners*—*Limitation Act (XV of 1877), sec. 22*—*Civil Procedure Code (Act XIV of 1882), sec. 32*—*Suit to recover possession*—*Suit by one of the plaintiffs as manager of the family*—*Right of manager to sue*—*Objection as to non-joinder at a late stage*—*Joinder of co-plaintiffs after the period of limitation*—*Limitation*.] A suit to recover possession of a house was originally brought by two plaintiffs, the second plaintiff being described as the manager of the family. Subsequently at a late stage of the suit, the defendants having raised an objection of non-joinder of parties, the other members of the family who, however, stated that they were satisfied to be represented by the plaintiff 2 as the manager of the joint family, were joined as co-plaintiffs, but after the expiry of the period of limitation prescribed for the suit. The first Court allowed the claim. The Judge in appeal reversed the decree and dismissed the suit as time-barred under section 22 of the Limitation Act (XV of 1877).

Held, reversing the decree of the Judge and restoring that of the first Court that section 22 of the Limitation Act (XV of 1877) does not in itself purport to determine directly whether the joinder of the parties after the institution of a suit shall in all cases necessarily involve the bar of limitation, if the period prescribed for such a suit has then expired. Such a result must depend upon consideration of the question whether the joinder was necessary to enable the Court to award such relief as may be given in the suit as framed. If fresh parties are merely joined for the purpose of safeguarding the rights subsisting as between them and others claiming generally in the same interest, the determination (by application of the provisions of section 22 of the Limitation Act) of the date of the institution of the suit as regards such freshly joined parties does not ordinarily affect the right of the original plaintiff to continue the suit and would not therefore attract the application of the general provisions of the Limitation Act (XV of 1877).

The question of the right of a manager to sue in that capacity is rather one of authority, if the other co-sharers are adults, and the right to insist on the other coparceners being brought on the record is for the benefit of the defendant to insure himself against further litigation and is therefore dependent on the objection being taken at an early stage, the objection on the score of want of authorization being one of a character which it would clearly be open to the defendant to waive.

GURUVAYYA v. DATTATRAYA

(1903) 28 Bom. 11

INÁMDAR—*Arrears of assessment*—*Occupancy tenant*—*Purchaser from the occupancy tenant*—*Decree for assessment*—*Money decree against the occupants*—*Charge on land*.] The plaintiff, an Inámdár, sued to recover assessment due for the years 1895-96 and 1896-97 from defendant 2 who came in as a purchaser from the original occupancy tenant on the 5th April, 1899. The lower Courts passed a personal decree against defendant 2 for the arrears of assessment.

Held, that defendant 2 was not liable, since an Inámdár suing for assessment was not entitled to a charge on the lands but only to a money decree against the occupants.

Ratanji v. Sakharum (1884) P. J., p. 68, followed.

VINAYAK v. LAKSHMAN

(1903) 28 Bom. 92

Bombay Revenue Jurisdiction Act (X of 1876), sec. 4 (b)—*Occupancy tenant*—*Claim by the Inámdár to recover assessment according to the survey rates*—*Tenant settling up fixed assessment*—*Objections under section 4 (b)*—*Civil Court—Jurisdiction*.] The plaintiff, an Inámdár, sued to recover from the defendant, an occupant, the assessment of the lands held by him in accordance with the survey rates. The defendant contended, among other things, that under certain *Muphi Istawa Kule* held by him, he had acquired the right to hold the lands permanently on payment of a fixed sum as rent. Plaintiff contended that by virtue of section 4, clause (b), of the Bombay Revenue Jurisdiction Act (X of 1876), the Civil Court was precluded from entertaining the defendant's contention.

Held, that clause (b) of section 4 of the Bombay Revenue Jurisdiction Act (X of 1876) presented no bar to the hearing by the Civil Court of the contention set up by the defendant.

An objection to come within 1st head of section 4, clause (b), of the Bombay Revenue Jurisdiction Act (X of 1876) must be "to the amount or incidence of any assessment of land revenue" itself and as such, in other words, apart from the question of any other and independent right, if an occupancy tenant complains that though he is bound to pay the assessment of land revenue, the amount or incidence of it as authorized by Government is too high, having regard to the nature of the soil and quality of his land and other like considerations, the objection is one purely and simply to such amount or incidence. But if without questioning the legality or propriety of the amount or incidence *per se*, he asserts a right independent of and having no relation to it, such as a right to pay a certain fixed amount annually under a contract between him and the Ināmdār he cannot be said to object to the amount or incidence of the assessment. Nor can such a tenant be said by his objection to object to the validity or effect of the notification of survey or settlement under the 3rd head of clause (b) of section 4 of the Bombay Revenue Jurisdiction Act (X of 1876).

"Objections" in section 4, clause (b), of the Act can be raised by a suit or in defence to a suit.

LAKSHMAN v. GOVIND

...

...

... (1903) 28 Bom. 74

INĀMDĀR—*Dasname Sanyasi and Gosavi Zundivale*—*Kadim (ancient) haks—Escheat—Corporate body—Fluctuating communities—Duty of the Court, if possible, to find legal origin of existing facts.*] The plaintiffs, whose title as Ināmdārs of a village dated back to 1762, sued on the strength of their title as Ināmdārs to recover, on account of certain haks, a sum of money which they alleged was due to them and was wrongly taken by the defendant. The defendant alleged that the haks were *Kadim* (ancient, that is, which came into existence prior to the Inām grant of the village to the plaintiffs' ancestors) and had escheated to Government. The Court below allowed the claim.

On appeal by the defendant,

Held, confirming the decree, that in order to make out that the Government had become entitled to the haks (*Dasname Sanyasi and Gosavi Zundivale*) by virtue of an escheat, three things must be established, namely, (1) that there was a heritable grant to individuals, (2) that the heirs of those individuals have failed, and (3) that on the happening of these two conditions the haks would escheat to Government.

The burden of establishing a title by escheat lies on those who assert it.

The expressions *Dasname Sanyasi and Gosavi Zundivale* do not indicate individuals. They indicate a group or community of Sanyasis or Gosavis.

The law of the country recognizes fluctuating communities as legal *persons* capable of owning property, as, for instance, the caste and the village, and the haks in the present case were communities composed of the religious elements their names indicate.

A corporate body is dissolved by the total loss of all its members, but on such dissolution there is no escheat to the Crown either of its lands or its rent-charges. On the dissolution of the corporation the cause of the grant fails, and the effect of a dissolution on the corporation's rent-charges is that they become extinguished. As in the case of the death of a grantee of an annual payment out of land to last during the term of his life the payment sinks into land on its determination, so where the grantee is a community and the grant is to last during the term of its existence on its dissolution a similar result follows.

GENERAL INDEX.

XXXV

Page

Where there has been a well established user extending over a long series of years it is the duty of the Court, if possible, to find a legal origin to the existing facts.

SECRETARY OF STATE *v.* HAIBATRAO HARI

... (1903) 28 Bom. 276

INCOME AND PROFITS—*Purchase by Municipal Corporation of Bombay of Tramway undertaking—Notice of intention to purchase—Arrangement by Corporation with third person—Date of purchase for purpose of ascertaining compensation—Liability of Tramway Company for track rent during period between notice and date of purchase—Bombay Tramways Act (Bom. Act I of 1874), sec. 30.*

See BOMBAY TRAMWAYS ACT

INCUMBRANCE—*Prior purchaser or incumbrancer—Priority not a right but an equity—Circumstances of each case.*

See PARTITION

INHERITANCE—*Hindu Law—Gujarāt—Father's father's sister's grandson—Mother's sister's son preferential heir—Moveables inherited by widow—Testamentary power of disposition—Mayukha.* In Gujarāt a mother's sister's son is the preferential heir to a father's father's sister's grandson.

Under the Mayukha a widow has no testamentary power of disposition over moveables which have been inherited by her from her husband.

Gudalhar Bhat v. Chandrabhagabai (1892) 17 Bom. 690, followed.

CHAMANLAL v. GANESH MOTICHAND

INJUNCTION—*Declaratory suit—Declaration—Further relief—Court—Specific Relief Act (I of 1877), sec. 42.*

Relief Act (I of 1877), sec. 42.

See SPECIFIC RELIEF ACT

Encroachment by protrusion of beams—Ownership of soil—Mandatory injunction.

See EASEMENT

Encroachment on land—Building over a dhora—Compensation not proper remedy. The defendant encroached on an abutment (*dhora*) of the wall of the plaintiff, which stood on a piece of ground belonging to the plaintiff. The wall divided the properties belonging to the parties. The abutment was on the defendant's side of the wall. The lower Appellate Court awarded compensation for this encroachment, on the ground that there was merely technical encroachment on the part of the defendant because only a foot or so of the plaintiff's ground was covered thereby:—

Held, that relief by way of injunction was the proper remedy in such a case, for to allow compensation would be to let a trespasser put a value or money's worth on another man's property and deprive him of it against his will.

Goodson v. Richardson (1874) L. R. 9 Ch. 221, followed.

JETHALAL HIRACHAND v. LALBHAI DALPATBHAI

... (1904) 28 Bom. 298

Mandatory injunction—Trespasser. A mandatory injunction should not be granted against a trespasser compelling him to come on the land on which he had trespassed to remove an encroachment made thereon by him.

NAVROJI MANEKJI WADIA v. DASTUR KHAJESDJI MAN-CHERJI

... (1903) 28 Bom. 20

INJURY TO NEIGHBOUR'S LAND—Damage—Trenches for foundations—Percolation of rain-water through the trenches.] The defendant dug a trench on his land for the foundation of a superstructure on his land. This trench was close to, and in a line with, the back wall of the plaintiff's house. The rain-water collected in the trench and percolating into the foundations of the plaintiff's house, caused the back wall of the plaintiff's house to subside and caused other damage. The plaintiff brought a suit to recover damages.

Held (1), that the defendant had a right to build on his land and for the purpose of building to make ditches for foundations;

(2) that the effective cause of the damage being the percolation of the rain-water which collected in the trenches and caused the shrinkage of the house, the defendant was not liable.

Before a person can be held liable in damages for injury caused to his neighbour's land by water either flowing from the former's land to the latter's or percolating from the one into the other, it must be shown that the water was brought or collected on his land by him voluntarily for his own purposes in a non-natural use of it. Otherwise, he is not liable.

MOHOLAL v. BAI JIVKORE ... (1904) 28 Bom. 472

INSTALLMENT IN DEFAULT—Interest on—Mortgage—Mortgage enforceable in its entirety—Transfer of Property Act (IV of 1882), secs. 58, 60 and 86.

See MORTGAGE ... 371

INTENTION—Dishonest intention—Knowledge—Removal of salt—Bombay Salt Act (Bombay Act II of 1890), sec. 47.

See BOMBAY SALT ACT ... 346

INTEREST—Interest on instalment in default—Mortgage—Transfer of Property Act (IV of 1882), secs. 58, 60 and 86.] The Courts do not lean towards compound interest, they do not award it in the absence of stipulation, but where there is a clear agreement for its payment, it is in the absence of disentitling circumstances allowed.

HARI v. RAMJI ... (1904) 28 Bom. 371

Payment of interest by principal—Liability of surety—Limitation Act (XV of 1877), sec. 20.

See LIMITATION ACT ... 248

INTERLOCUTORY ORDERS—Privy Council—Leave to appeal—Jurisdiction, question of—Letters Patent, clauses 13, 40.

See LETTERS PATENT ... 292

IRRIGATION DEPARTMENT—Bombay Irrigation Act (Bom. Act VII of 1879), secs. 3, sub-section (2), 5, 8, 23, 27, 28—Nala—Water-course—Canal—Right to control water or to obstruct the use thereof—Riparian Proprietor—Emblement and benefit of water—Strict construction of statutes encroaching on the rights of subjects.

See BOMBAY IRRIGATION ACT ... 105

JOINDER OF PARTIES—Civil Procedure Code (Act XIV of 1882), sec. 30—Gujarat Talukdars' Act (Bom. Act VI of 1888), sec. 12—Representative order—Partition suit—"Known co-sharers"—All persons interested, parties.] It is a general rule that all persons interested ought to be made parties to a suit, however numerous they may be, so that the Court may be enabled to do complete justice by deciding upon and settling the rights of all persons interested and that the orders of the Court may be safely executed by those who are compelled to

GENERAL INDEX.

xxxvii

Page

obey them and future litigations may be prevented. This rule, no doubt, yields to the exigencies of particular cases and there are well established qualifications to it, such as the power of the Court under section 30 of the Civil Procedure Code (Act XIV of 1882) to make a representative order.

The phrase 'known co-sharers' in section 12 of the Gujarát Talukdars' Act (Bom. Act VI of 1888) covers all persons who are known to have an interest in the property and is not limited to those co-sharers whose names are recorded under the Act.

A person, who ought to be, but is not, a party to a proceeding is not ordinarily bound by any decree or order passed therein.

CHUDASAMA SURSANGJI v. PARTAPSANG KHENGARJI ... (1903) 28 Bom. 209

JOINDER OF PARTIES—*Limitation Act (XV of 1877), sec. 22—Civil Procedure Code (Act XIV of 1882), sec. 32—Suit to recover possession—Suit by one of the plaintiffs as manager of the family—Right of manager to sue—Objection as to non-joinder at a late stage—Joinder of co-plaintiffs after the period of limitation—Limitation.*

See LIMITATION ACT

JOINT PROPERTY—*Partition—Minor coparceners—Guardian's defalcations respecting joint property—Minor's share.* ... 11

See PARTITION

JUDGE—*Powers of the Judge to question the Jury—Criminal Procedure Code (Act V of 1898), secs. 303, 304.* ... 330

See JURY

JURISDICTION—*Bombay Revenue Jurisdiction Act (X of 1876), sec. 4 (b)—Indamdar—Occupancy tenant—Claim by the Indamdar to recover assessment according to the survey rates—Tenant setting up fixed assessment—Objections under sec. 4 (b)—Civil Court.* ... 412

See BOMBAY REVENUE JURISDICTION ACT

—*Civil Procedure Code (Act XIV of 1882), sec. 268—Decree—Execution—Salary of Railway servant—Disbursing officer outside the jurisdiction of the Court—Prohibitory order.* ... 74

See EXECUTION

—*Decree passed without jurisdiction—Decree—Execution—Appeal—Practice—Civil Procedure Code (Act XIV of 1882), secs. 225, 228, 244, 588.* ... 108

See EXECUTION

—*Execution of decree—Partition by Collector—Objections to the partition—Court's jurisdiction to hear the objections.* ... 378

See EXECUTION

—*Order passed without jurisdiction—Grounds for non-interference in extraordinary jurisdiction—Civil Procedure Code (Act XIV of 1882), secs. 278—283, 622.* ... 238

See CIVIL PROCEDURE CODE

—*Service land—Sanad grant—Suit for the recovery of possession—Secretary of State for India in Council, defendant—Bombay Revenue Jurisdiction Act (X of 1876), sec. 4 (a).] Held, that under section 4 (a) of the Bombay Revenue Jurisdiction Act (X of 1876), a Civil Court had no jurisdiction to entertain the suit against the Secretary of State for India in Council (the grant being of land and not of revenue).* ... 458

APPABI v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL. (1904) 28 Bom. 435

JURISDICTION—*Suit against Administrator General—Civil Court—Bombay Civil Courts Act (XIV of 1869), sec. 32.* A suit against the Administrator General as representing the estate of a deceased private individual must be brought in the District Court and not in the Court of a Subordinate Judge, by virtue of section 32 of the Bombay Civil Courts Act (XIV of 1869).

ANTONE v. ADMINISTRATOR GENERAL OF BOMBAY ... (1904) 28 Bom. 529.

JURY—*Criminal Procedure Code (Act V of 1898), secs. 303, 304—Judge—Misunderstanding the law—Verdict mistaken or ambiguous—Powers of the Judge to question the jury.* Section 304 of the Criminal Procedure Code (Act V of 1898) obviously contemplates cases where the verdict delivered is not in accordance with what was really intended by the jury. It has no application where there is no accident or mistake in the delivery of the verdict; and the mistake lies in the misunderstanding of the law by the jury. If such a mistake results in an erroneous verdict, it can be corrected only by the Judge disagreeing with the jury and referring the case under section 307 of the Code to the High Court.

PER CURIAM:—"There is no provision in the Code of Criminal Procedure (Act V of 1898) which empowers the Judge to question the jury as to their reasons for a unanimous verdict when there is nothing ambiguous in the verdict itself, and no lurking uncertainty in the minds of the jury themselves regarding it. Section 303 of the Code limits the power of the Judge to question to cases in which it is necessary to ascertain what the verdict of the jury is—that is, where the verdict being delivered in ambiguous terms or with uncertain sound their meaning is not clear."

EMPEROR v. KONDIBA (1904) 28 Bom. 412

KADIM HAKS—*Indmdār—Dasname Sanyasi and Gosavi Zundivale—Escheat—Corporate body—Fluctuating communities—Duty of the Court, if possible, to find legal origin of existing facts.*

See INAMDAR 276

LETTERS OF ADMINISTRATION—*Scope of enquiry prior to grant—Practice.* On the hearing of a petition for issue of Letters of Administration to the estate of a deceased person it is not the province of the Court to go into questions of title to the property to which the Letters of Administration refer.

OCHAVARAM NANABHAI v. DOLATRAM JAMIETRAM .. (1904) 28 Bom. 641

LETTERS PATENT, CLAUSES 13, 40—*Privy Council—Leave to appeal—Interlocutory orders—Jurisdiction, question of.* The High Court in the exercise of its Extraordinary Original Civil Jurisdiction removed to itself for trial a suit instituted in the Court of the Resident at Aden. On an application having been made for leave to appeal to the Privy Council,

Held, that the certificate prayed for should be given, for (1) even if the order to be appealed from was interlocutory, the High Court had discretion to grant the certificate under clause 40 of the Amended Letters Patent; (2) that value of the subject-matter was Rs. 10,000; and (3) the question raised was one of jurisdiction.

MUNICIPAL OFFICER, ADEN, v. ABDUL KARIM ... (1904) 28 Bom. 292

LICENSE—*City of Bombay Municipal Act (III of 1888), sec. 394—Specific Relief Act (I of 1877), sec. 45—Discretion.* The power of the Municipal Commissioner of Bombay to grant a license under section 394 of the City of Bombay Municipal Act (III of 1888) includes the power to refuse it.

PER CURIAM: The Court cannot substitute its judgment for that of the Municipal Commissioner. Unless it is clear beyond doubt that the Municipal Commis-

sioner is using his authority with some indirect motive and for a collateral purpose, not for the purpose for which the Legislature has armed him with the power, the Court cannot interfere with his discretion.

Haji Ismail v. The Municipal Commissioner of Bombay: Ahmed Moosa v. The Municipal Commissioner of Bombay ... (1903) 28 Bom. 253

LIEN—*Charter-party—Power to sublet—Sub-charter—Goods shipped under sub-charter and bills of lading authorized by time charter—Liability of such goods for lien given by time charter—Notice of time charter—“Without prejudice to this charter,” meaning of—Form, construction, and effect of bills of lading—Lien for hire of vessel.*

See CHARTER-PARTY ... 573

LIMITATION—*Mamlatdars' Courts Act (Bom. Act III of 1876), secs. 4, 15, 18 and 21—Limitation Act (XV of 1877), sch. II, art. 47—Possessory Suit in Mamlatdar's Court—Rejection of plaint—Subsequent Suit for possession on title in ordinary Court—Limitation.* A plaintiff suing in the ordinary Courts on his title for the possession of land is not bound by reason of anything in article 47, schedule II, of the Limitation Act (XV of 1877), or section 21 of the Mamlatdars' Courts Act (Bom. Act III of 1876) contained to bring his suit within three years from the previous rejection of his plaint by a Mamlatdar in a suit for the possession of that land.

As a suit on title is outside the Mamlatdar's jurisdiction, a mere rejection of a plaint by him cannot be treated as an order binding the plaintiff in reference to that which is the cause of action in a suit on title.

TUKARAM v. HARI ... (1904) 23 Bom. 601

—*Redemption suit—Mortgage by persons other than the real owner—Acquiescence of the real owner—Mortgagee's possession adverse to the real owner.*

See ADVERSE POSSESSION ... 87

LIMITATION ACT (XV OF 1877), SECS. 5, 14—*Appeal—Delay—Excuse—Time taken up in prosecuting an appeal in a wrong Court—Sufficient cause.* In a suit for partition, the High Court on regular appeal passed a decree on the 28th February, 1903. E., who was a party to the proceedings, applied to the Subordinate Judge on the 16th February, 1901, to execute the decree. D., who was also a party to the suit, opposed the application on the ground that it was time-barred. On the 4th March, 1902, the Subordinate Judge held the application to be presented within time. D. appealed to the District Court on the 20th March, 1902; but that Court on the 28th January, 1903, upheld the order passed by the Subordinate Judge. Against this decision D. preferred a second appeal to the High Court on the 17th April, 1903, on the ground that the District Court should have held that it had no jurisdiction to entertain the appeal. On the 23rd June, 1903, the High Court held that the District Judge had no jurisdiction to entertain the appeal and directed him to return the appeal to D. for presentation to the proper Court. The appeal was accordingly returned on the 11th July, 1903, to D., who filed it in the High Court on the 17th July, 1903. At the hearing a preliminary objection was raised that the appeal was presented beyond time and that the delay could not be excused.

Held, that the appeal was presented beyond time; and that no sufficient cause for not filing the appeal before April, 1903, having been shown, the delay in presenting it could not be excused under section 5 of the Limitation Act (XV of 1877).

DAUDBHAI MUSABHAI v. EMBABAI ... (1903) 28 Bom. 235

LIMITATION ACT (XV) OF 1877, SEC. 12, ART. 151—*Limitation—Appeal—Copy of Judgment—Practice.*] The time that elapses between the date of an application for a copy of the judgment complained of and the date of issue of such copy to the applicant is to be excluded in computing the period of limitation prescribed for an appeal.

Haji Hassum v. Nur Mahomed ...

... (1901) 28 Bom. 643

SEC. 20—*Part-payment—Statement in writing not in debtor's hand—Debtor's mark beneath—Limitation.*] The condition prescribed by section 20 of the Limitation Act XV of 1877 that part-payment of the principal debt should appear in the handwriting of the person making the same is satisfied if the payer affixes his mark beneath an endorsement not written by him.

Jamna v. Jaga Bhana ...

... (1903) 28 Bom. 262

SEC. 20—*Principal—Surety—Payment of interest by principal—Liability of surety.*] The payment of interest by the debtor within limitation does not give a fresh starting point for limitation against the surety under section 20 of the Limitation Act (XV of 1877) even in the absence of a prohibition by the surety against the payment of interest by the debtor on his account.

Gopal Daji v. Gopal Bin Sonu ...

... (1903) 28 Bom. 248

SEC. 22—*Civil Procedure Code (Act XIV of 1882), sec. 32—Suit to recover possession—Suit by one of the plaintiffs as manager of the family—Right of manager to sue—Objection as to non-joinder at a late stage—Joinder of co-plaintiffs after the period of limitation—Limitation.*] A suit to recover possession of a house was originally brought by two plaintiffs, the second plaintiff being described as the manager of the family. Subsequently at a late stage of the suit, the defendants having raised an objection of non-joinder of parties, the other members of the family who, however, stated that they were satisfied to be represented by the plaintiff 2 as the manager of the joint family, were joined as co-plaintiffs, but after the expiry of the period of limitation prescribed for the suit. The first Court allowed the claim. The Judge in appeal reversed the decree and dismissed the suit as time-barred under section 22 of the Limitation Act (XV of 1877).

Held, reversing the decree of the Judge and restoring that of the first Court, that section 22 of the Limitation Act (XV of 1877) does not in itself purport to determine directly whether the joinder of the parties after the institution of a suit shall in all cases necessarily involve the bar of limitation, if the period prescribed for such a suit has then expired. Such a result must depend upon consideration of the question whether the joinder was necessary to enable the Court to award such relief as may be given in the suit as framed. If fresh parties are merely joined for the purpose of safeguarding the rights subsisting as between them and others claiming generally in the same interest, the determination (by application of the provisions of section 22 of the Limitation Act) of the date of the institution of the suit as regards such freshly joined parties does not ordinarily affect the right of the original plaintiff to continue the suit and would not therefore attract the application of the general provisions of the Limitation Act (XV of 1877).

The question of the right of a manager to sue in that capacity is rather one of authority, if the other co-sharers are adults, and the right to insist on the other coparceners being brought on the record is for the benefit of the defendant to insure himself against further litigation and is therefore dependent on the objection being taken at an early stage, the objection on the score of want of authorisation being one of a character which it would clearly be open to the defendant to waive.

Guruvayya v. Dattatraya ...

... (1903) 28 Bom. 11

LIMITATION ACT (XV OF 1877), SCH. II, ART. 47—*Civil Procedure Code (Act XIV of 1882), sec. 13, explanation II—Math—Manager—Possessory suit in Mamladar's Court in a personal and private capacity—Subsequent civil suit in a representative capacity—Limitation.*] The defendant took the house in dispute on lease from one Raghunathdas who was the manager of a certain math. After the death of Raghunathdas his disciple, the present plaintiff, brought a possessory suit in the Mamlatdar's Court against the defendant, and the Mamlatdar on the 6th May, 1889, dismissed the suit on the ground that by not producing a succession certificate the plaintiff had failed to establish his title as heir to Raghunathdas. Subsequently the plaintiff, describing himself as the manager of the math, brought the present suit on the 7th February, 1900, to recover possession of the house and rent or damages for use and occupation. It was contended that the suit was time-barred under article 47, schedule II, of the Limitation Act (XV of 1877), it being not brought within three years from the date of the Mamlatdar's order.

Held, that the suit was not time-barred under article 47, schedule II, of the Limitation Act (XV of 1877), because the first suit in the Mamlatdar's Court was brought by the plaintiff in his personal and private capacity, while the second suit was brought by him as manager and on behalf of the math.

In connection with the property of a math there are two distinct classes of suits; those in which the manager seeks to enforce his private and personal rights and those in which he seeks to vindicate the rights of the math.

A math like an idol is, in Hindu Law, a judicial person capable of acquiring, holding and vindicating legal rights through the medium of some human agency. When the property is vested in the math, then litigation in respect of it has ordinarily to be conducted by, and in the name of, the manager, not because the legal property is vested in the manager, but because it is the established practice that the suit should be brought in that form. But a person in whose name the suit is thus brought has in relation to that suit a distinct capacity; he is therein a stranger to himself in his personal and private capacity in a Court of law.

An order in a Mamlatdar's suit does not give rise to the bar to which explanation II of section 13 of the Civil Procedure Code (Act XIV of 1882) relates.

BARAJIRAO v. LAXMANDAS ... (1903) 28 Bom. 215

SCH. II, ART. 119.—*No adverse interest as between the parties—Adoption—Suit to declare validity of adoption—Interference with adopted son, nature of.*] Article 119 of schedule II of the Limitation Act (XV of 1877) applies to a suit "to obtain a declaration that an adoption is valid"; and there are no words in it making it applicable to a suit for a declaration that an alleged adoption did take place. The article is, therefore, to be applied only where the question is not as to the *factum* but the validity of an adoption. The interference mentioned in the article as a condition of its application so as to bar the plaintiffs' right altogether is obviously an interference which must amount to an absolute denial of the status of adoption held by a plaintiff and an unconditional exclusion of him from the enjoyment of his rights in virtue of that status. The article can have no application to a case where the facts suggest that the interference, such as it was, was intended to have no greater effect than that of postponing the right of the adopted son to succeed as heir to the property of his adoptive father.

NINGSWA v. RAMAPPA ... (1903) 28 Bom. 94

SCH. II, ART. 179, CL. 5—*Execution—Decree—Application for execution—Civil Procedure Code (Act XIV of 1882), sec. 248—Notice—Date of the order.*] The date of issuing a notice under section 248 of the Civil Procedure Code (Act XIV of 1882) is the date on which the Court orders

that it should issue, and not the date on which the notice is formally drawn up afterwards and signed. The limitation therefore under article 179, clause 5, of the second schedule to the Limitation Act (XV of 1877) runs from the former date.

GOVIND v. DADA (1904) 28 Bom. 416

LIS PENDENS—Mortgage-decree—Execution proceedings—Purchase at a Court-sale under another decree—Pendency of the execution proceedings. On the 16th February, 1883, R. obtained a decree on a mortgage against B. While execution proceedings under this decree were pending, a money-decree was obtained against B. by another person; and at a Court-sale held in execution thereof, the property was purchased by S. on the 18th December, 1886. S. obtained his certificate of sale on the 20th December, 1887, and obtained possession of the property on the same day. S. subsequently sold the property to the defendants, who came into possession of the property. The execution proceedings under the mortgage-decree terminated in the sale of the property, which was purchased by R. R. obtained his certificate of sale on the 5th September, 1887, and sold the property to the plaintiffs. The plaintiffs sued to recover possession from the defendants.

Held, that, under the law as it stood before the Transfer of Property Act came into force, as the purchase on which the defendants relied took place during the pendency of the proceedings in execution of the mortgage-decree, it was affected by *lis pendens* and was therefore void as against the plaintiffs who were purchasers under the mortgage-decree.

Shujiram v. Waman (1897) 22 Bom. 939, followed.

SAMAL v. BABAJI (1904) 28 Bom. 561

MALICIOUS PROSECUTION—Partner and firm—Liability of firm for costs of one partner—Indictment containing several charges whereof for some there is, and for others there is not, probable cause—Reasonable and probable cause—Circumstances of suspicion—Prosecution, commencement of. A malicious prosecution by the managing partner of a firm does not render the other members of the firm liable in damages, unless it is shown that the firm was in some way or other concerned in the prosecution and had instigated it.

Where a person prefers an indictment containing several charges, whereof for some there is, and for others there is not, probable cause, he becomes liable for preferring that indictment without reasonable and probable cause.

Reed v. Taylor (1812) 4 Taun. 616, followed.

Mere circumstances of suspicion cannot be relied on as evidence of reasonable and probable cause as a defence to an action for malicious prosecution.

Buset v. Gibbons (1861) 30 L.J. Ex. 75, followed.

A prosecution commences when a complaint is made. It is not necessary, in order to maintain an action for malicious prosecution, that the charge was acted upon by the Magistrate: it is enough if the charge was made to the Magistrate with a view of inducing him to entertain it.

AHMEDBHAI v. FRANJI EDULJI (1903) 28 Bom. 226

MAMLATDARS' COURTS ACT (BOM. ACT III OF 1876)—Limitation Act (XV of 1877), sch. II, art. 47—Civil Procedure Code (Act XIV of 1882), sec. 13, Exptn. II—Mamlatdar—Manager—Possessory suit in Mamlatdar's Court in a personal and private capacity.

See LIMITATION ACT 215

SECS. 4, 15, 18 AND 21—*Limitation Act (XV of 1877), sch. II, art. 47—Possessory Suit in Mamlatdar's Court—Rejection of plaint—Subsequent suit for possession on title in ordinary Court—Limitation.* A plaintiff suing in the ordinary Courts on his

GENERAL INDEX.

xlvi

Page

title for the possession of land is not bound by reason of anything in article 47, schedule II, of the Limitation Act (XV of 1877), or section 21 of the Māmlatdār's Courts Act (Bom. Act III of 1876) contained to bring his suit within three years from the previous rejection of his plaint by a Māmlatdār in a suit for the possession of that land.

As a suit on title is outside the Māmlatdār's jurisdiction, a mere rejection of a plaint by him cannot be treated as an order binding the plaintiff in reference to that which is the cause of action in a suit on title.

TUKARAM v. HARI ...

(1904) 28 Bom. 601

MANAGER—*Math*—Possessory suit in a Māmlatdār's Court in a personal and private capacity—Subsequent civil suit in a representative capacity—Limitation Act (XV of 1877), sch. II, art. 47.

See LIMITATION ACT ...

MARRIAGE—*Brahmo-Samaj*—Polygamy—Act III, 1872, sec. 19.] ... 215

A marriage performed in accordance with the rights of the Brahmo-Samaj is invalidated by the fact that either of the parties thereto has a husband or wife by a previous marriage alive.

SONALUXMI v. VISHNUPRASAD ...

(1908) 28 Bom. 597

MATH—Manager—Possessory suit in Māmlatdār's Court in a personal and private capacity—Subsequent civil suit in a representative capacity—Limitation Act (XV of 1877), sch. II, art. 47.

See LIMITATION ACT ...

MINOR—Contract with minor void—Refund of money—Specific Relief Act (I of 1877), sec. 41.] ... 215

The decision in *Mohori Bibee v. Dharmodas Ghose* (1903) 30 Cal. 539 is to the effect that a contract by minor, such as a mortgage, is void and that a money-lender who has advanced money to a minor on the security of the mortgage is not entitled to repayment of the money on a decree being made declaring the mortgage invalid. That decision, however, is also an authority for the proposition that the circumstances of a particular case may be such that having regard to section 41 of the Specific Relief Act (I of 1877), the Court may, on adjudging the cancellation of an instrument, require the party to whom such relief is granted to make any compensation to the other which justice may require.

DATTARAM v. VINAYAK ...

(1903) 28 Bom. 181

Guardian—Succession Certificate—Succession Certificate Act (VII of 1889), sec. 6, cl. (d).

See SUCCESSION CERTIFICATE ACT ...

344

Guardian *ad litem*—Nazir—Court's power to relieve.] There is nothing that compels the Court to retain as guardian *ad litem* of a minor one of its officers, where the circumstances of the case make it clear that the interests of the minor will be thereby imperilled. The Court has power to relieve the Nazir of his position as guardian when the Nazir has no funds for the purpose of conducting adequately the defence of the minor.

Narayandas Ramdas v. Sahab Husein (1888) 12 Bom. 553, referred to.

GOPILAL v. AGARSINGJI ...

(1904) 28 Bom. 626

Minor coparceners—Joint property—Guardian's defalcations respecting joint property—Partition—Minor's share.

See PARTITION ...

330

MISJOINDER OF PARTIES—*No adverse interest as between the parties—Limitation Act (XV of 1877), sch. II., art. 119—Adoption—Suit to declare validity of adoption—Interference with adopted son, nature of.* Plaintiff 1, the daughter of Ningangavda, and plaintiff 2, the adopted son of Ningangavda, together brought a suit against the defendants to recover possession of Ningangavda's property. The right alleged in plaintiff 1 was that she had been living with plaintiff 2 in the house of which possession had been given to the first defendant under a decree of the Mámlatdár. The plaint contained no averment asking for relief in favour of plaintiff 1 in the event of plaintiff 2's adoption being found not proved. On an objection having been raised as to misjoinder of parties,

Held, that the suit was not bad for misjoinder of parties, since plaintiff 1, beyond alleging in the plaint that she was Ningangavda's daughter, did not set up her right to recover the property as Ningangavda's daughter, but claimed it with plaintiff 2, on the ground that the latter was Ningangavda's son, and that she lived with him.

Fakirapa v. Rudrapa (1891) 16 Bom. 119, followed, and *Lingammal v. Chinna* (1882) 6 Mad. 239, distinguished.

Article 119 of schedule II of the Limitation Act (XV of 1877) applies to a suit "to obtain a declaration that an adoption is valid": and there are no words in it making it applicable to a suit for a declaration that an alleged adoption did take place. The article is, therefore, to be applied only where the question is not as to the *factum*, but the validity of an adoption. The interference mentioned in the article as a condition of its application so as to bar the plaintiffs' right altogether is obviously an interference which must amount to an absolute denial of the status of adoption held by a plaintiff and an unconditional exclusion of him from the enjoyment of his rights in virtue of that status. The article can have no application to a case where the facts suggest that the interference, such as it was, was intended to have no greater effect than that of postponing the right of the adopted son to succeed as heir to the property of his adoptive father.

NINGAWA v. RAMAPPA

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... (1903) 28 Bom. 91

MISTAKE—*Contract—Proposal with unqualified assent—Mistake in expression—Common mistake—Unilateral mistake—Contracting party not able to read—Contract differing from that pretended to be read.* It is of the essence of a contract that there should be (expressly or by implication) a proposal to which an unqualified assent has been given: without such assent there is no contract: the minds of the contracting parties are not at one.

Mistake in expression may be either common or unilateral.

Mistake in expression implies that the minds of the parties are not at one on that which is expressed; but it does not follow that in every case where there in fact has been such mistake there is no contract. Practical convenience dictates that men should be held to the external expression of their intentions, unless this be outweighed by other considerations: and to this legal effect is given by the law of evidence, which permits oral proof at variance with documents only in certain cases: in the rest the proof, if it be of mistake, is not received, so that the mistake does not come to light, and in a Court of law does not exist.

The Court, administering equitable principles, permits mistake to be proved when it is common: that is, where the expression of the contract is contrary to the concurrent intention of all the parties. If such mistake be established, then the Court can give the relief of rectification, but what is rectified is not the agreement, but the mistaken expression of it.

The general rule is that the intention of contracting parties is to be gathered from the words they have used. Where the mistake is unilateral, it does not ordinarily affect the rights which are the legitimate consequence of the words, though it may affect the remedy that will be awarded against the party in error.

But mistake known at the time to the other party may be proved and performance in accordance with the terms of the error will not be compelled.

A mistake even not known has legal consequences, provided there can be restoration of all parties concerned to their original position.

Where a contracting party, who cannot read, has a written contract falsely read over to him and the contract written differs from that presented to be read, the signature on the document is of no force because he never intended to sign and therefore in contemplation of law did not sign the document on which the signature is.

If a person executes a document knowing its contents but misappreciates its legal effect, he cannot deny its execution.

DAGDU v. BHANA

MORTGAGE—Mortgage debt—Another debt on a previous khata made payable under the deed—Charge. (1904) 28 Bom. 420

The property in suit was mortgaged for Rs. 1,500. The mortgage-deed further recited an earlier debt of Rs. 5,000 due on a previous khata and provided that if the mortgagor did not repay this Rs. 5,000 within two years from the date of the deed, he was not at liberty to redeem the property, unless both the debts of Rs. 1,500 and Rs. 5,000 were paid. The deed was stamped as a mortgage for Rs. 6,500.

On a construction of the deed :

Held, that the property mentioned in the deed was mortgaged for the sum of Rs. 5,000 and interest payable thereunder and also for Rs. 1,500, with this difference that the mortgage as to the former sum took effect on the expiry of two years after the date of the deed.

HARI v. VISHNU

Mortgage-deed—Execution proceedings—Purchase at a Court-sale (1904) 28 Bom. 349

under another deed—Pendency of the execution proceedings—Lis pendens.

See LIS PENDENS

Mortgagee in possession expending money to defend his title against mortgagee—Suit for account—Transfer of Property Act (IV of 1882), sec. 72

See TRANSFER OF PROPERTY ACT

Prior mortgagee—Subsequent mortgagee—Rights to redeem inter se

Foreclosure decree—Transfer of Property Act (IV of 1882), secs. 75, 85, 86, 91.

See REDEMPTION

Redemption suit—Mortgage by persons other than the real owner—

Acquiescence of the real owner—Mortgagee's possession adverse to the real owner.

See REDEMPTION

Transfer of Property Act (IV of 1882), secs. 58, 60 and 86—Contract

Act (IX of 1872), sec. 16—Sawalkhadi—Interest on instalment in default—Mortgage enforceable in its entirety—Each case to be decided by its own circumstances. A mortgage-deed, both the parties to which were money-lenders, purported to be security for Rs. 5,000 as principal and Rs. 1,250 sawai, repayable by 72 instalments. The sawai, which equalled one-fourth of Rs. 5,000, was to take the place of interest. The sum of Rs. 5,000 was made up as follows :—Rs. 4,812-8 were paid to the mortgagor in cash, Rs. 87-8 were retained by the mortgagee on account of the first instalment and Rs. 100 were retained on account of khat hadi (bonus). The mortgagee having brought a suit to recover the mortgage-debt, namely, Rs. 7,995, and a question having arisen whether the mortgage was so unconscionable as to be unenforceable in its integrity,

Held, that under the circumstances of the case, the mortgage was enforceable in its integrity.

PER CURIAM:—The principles of justice, equity and good conscience do not of necessity disentitle a mortgagee from insisting on his security for a greater sum than what has been actually advanced: in each case the question must be asked whether there has or has not been a hard and unfair bargain on the borrower, but when that is not established against the mortgagee then the right to redeem still remains, though it is redeeming not on payment of the sum advanced, but of the sum which the parties agreed it was worth the mortgagor's while to pay in order to get a smaller advance when he was in want of money.

Each case must be determined according to its own circumstances.

Held, further, that there was nothing illegal in the provision for the payment of *sawai*.

PER CURIAM:—The Courts do not lean towards compound interest, they do not award it in the absence of stipulation, but where there is a clear agreement for its payment, it is in the absence of disentitling circumstances allowed.

HARI v. RAMJI ... (1904) 28 Bom. 371

MOVEABLE PROPERTY—*Movables inherited by widow—Testamentary power of disposition—Mayukha—Hindu Law.*

See HINDU LAW ... 438

MUNICIPALITY—*District Municipal Act (Bom. Act II of 1884), secs. 27 (2), (17) and 30—Contract Act (IX of 1872), secs. 2, 23, 25 and 63—Special general meeting—President—Dispensation or remission—Promise—Contract by Corporation—Executed consideration.* In order that a meeting of the Special General Committee of a District Municipality should be properly constituted, it must be called by the President under section 27 (2) of the District Municipal Act (Bom. Act II of 1884). If the meeting be not so called, the defect is not cured by section 27 (17).

Under section 63 of the Contract Act (IX of 1872) there can be dispensation or remission only by means of a promise. There must be a proposal of the dispensation or remission which is accepted.

Under section 19 of the Contract Act consideration is not an essential of an agreement. In the Act the word "agreement" refers both to "a promise" and a "set of promises forming the consideration for each other."

Though a contract by a corporation must ordinarily be made under seal, still, where there is that which is known as an executed consideration, an action will lie though this formality has not been observed.

KBAJI SITARAM v. TRIMBAK MUNICIPALITY ... (1903) 28 Bom. 66

—*Non-feasance—Negligence in performance of duty towards plaintiff—Suit for damages—The Bombay District Municipal Act (Bombay Act III of 1901).*

See BOMBAY DISTRICT MUNICIPAL ACT ... 340

NAZIR—*Minor—Guardian ad litem—Court's power to relieve.*

See MINOR ... 626

NEGLIGENCE—*Negligence of Chief Constable—Suit to recover damages—Secretary of State in Council—"Liabilities lawfully contracted and incurred"—Statute 21 and 22 Vict., c. 106, secs. 41, 42 and 65—Construction.*

See SECRETARY OF STATE ... 314

GENERAL INDEX.

xlvii

Page

NON-FEASANCE—*Negligence in performance of duty towards plaintiff—The Bombay District Municipal Act (Bombay Act III of 1901).*

See BOMBAY DISTRICT MUNICIPAL ACT ...

NOTICE, DATE OF—*Civil Procedure Code (Act XIV of 1883), sec. 248.* ... 340

See LIMITATION ACT ...

NOTICE, VALIDITY OF—*Purchase by Municipal Corporation of Bombay of Tramway undertaking—Notice of intention to purchase—Arrangement by Corporation with third person—Date of purchase for purpose of ascertaining compensation—Liability of Tramway Company for track rent during period between notice and date of purchase—Bombay Tramways Act (Bomb. Act I of 1874), sec. 80.* ... 416

See BOMBAY TRAMWAYS ACT ...

OFFENCE—*Dishonest intention—Knowledge—Removal of salt—Bombay Salt Act (Bombay Act II of 1890), sec. 47.* ... 502

See BOMBAY SALT ACT ...

OWNERSHIP OF SOIL—*Encroachment by protrusion of beams—Mandatory injunction—Easement.* ... 346

See EASEMENT ...

PARSI FIRE-TEMPLE—*Atash Behram (Parsi fire-temple)—Parsi community of Ududa—Trust—Suit—Capacity to hold property—Civil Procedure Code (Act XIV of 1882), sec. 539—Mandatory injunction—Trespasser.] In this country a fluctuating body of persons, such as a village community, is capable of owning property.* ... 428

It is opposed to the notions of the Parsi community that the Iran Shah (sacred fire) should be regarded as capable of, or the subject of, ownership; but even if there be difficulty or doubt as to its ownership, it is obvious that there must be some one entitled to protect from improper invasion the temple property; and those who can predicate of themselves that they have exercised the management, authority and supervision as alleged in the plaint, are so entitled.

The Parsi inhabitants of Ududa, as the Anjuman (that is, a constituted council or assembly to which all questions regarding their peculiar customs are referred) of that town, are vested with the control, management and supervision of the Atash Behram at that place and all that appertain to it.

A suit for the vindication of the right of management which is vested in, and actually being exercised by, the plaintiffs and those they represent at the date of the obstruction does not fall within section 539 of the Civil Procedure Code (Act XIV of 1882) merely because those who cause the obstruction happen to have been nominated trustees.

A mandatory injunction should not be granted against a trespasser compelling him to come on the land on which he had trespassed to remove an encroachment made thereon by him.

NAVROJI MANEKJI WADIA v. DASTUR KHAISEDJI MEN-
CHERJI ...

PARTIES, Joinder of. ... (1903) 28 Bom. 20

See JOINDER OF PARTIES ...

PARTITION—*Joint Property—Minor coparceners—Guardian's defalcations respecting joint property—Minor's share.] In a partition suit, the minor plaintiff's share ought not to be burdened with the liabilities of his guardian, merely because his guardian committed defalcations in respect of the joint property of the parties to the suit, in the absence of any allegation or proof that the plaintiff had derived benefit therefrom.* ... 11

SONU v. DHONDU ...

(1904) 28 Bom. 330

PARTITION—*Prior purchaser or incumbrancer—Priority not a right but an equity—Circumstances of each case—Account of past transactions—Death of a coparcener pending appeal by him—Representation by the coparcener's widow in and for purposes of appeal.* The principle laid down in *Pandurang v. Bhaskar* (11 Bom. H. C. R. 72) and *Udaram v. Ramu* (11 Bom. H. C. R. 76) has settled the law governing decrees for partition. Prior purchasers or incumbrancers are, as far as possible, entitled to priority but not as a matter of right. It is only an equity, and the question how and where the equity should be invoked in aid of a party must depend upon equitable considerations which, again, must depend on the circumstances of each case.

In a partition suit no coparcener has any right to an account of past transactions.

A coparcener (who claimed the whole of the property in suit but who was only allowed a share in that property by the lower Courts) having died pending second appeal by him, his widow was allowed to represent him in or for the purposes of the second appeal notwithstanding the application of the coparceners of the deceased that they were entitled to his share.

NABAYAN BIN BABAJI v. NATHAJI DURGAI ... (1903) 28 Bom. 201

PARTNER AND FIRM—*Liability of firm for torts of one partner—Malicious prosecution.*

See MALICIOUS PROSECUTION ... 226

PARTNERSHIP—*Dissolution of partnership—Appointment of Receiver—Debt of the firm—Decree against one partner—Satisfaction of the decree by the partner—Suit by the partner against his co-partners for contribution—Court—Practice and procedure.* The plaintiff and defendants traded in partnership from 1884 to 1894. In 1894 a suit for dissolution of the partnership was instituted with the result that on the 11th June, 1897, a decree was passed appointing a Receiver with the usual directions for accounts and inquiry. In the meanwhile, J., a creditor of the partnership, sued the plaintiff and defendants for the debt due to him, but the Court passed a decree against the plaintiff alone, leaving his rights against the defendants to be settled in the accounts under the decree dated the 11th June, 1897. The plaintiff satisfied J.'s decree, which was for Rs. 5,561-5-9 by means of a *havela* under which S. and K. paid on his account Rs. 5,400 to J. The balance Rs. 161-5-9 due under the decree was paid to J. by plaintiff himself. The plaintiff then instituted a suit to recover from the defendants their share of the decretal debt. The Subordinate Judge awarded the plaintiff's claim. On appeal,

Held, (1) that as J.'s decree had been satisfied by the plaintiff becoming liable to S. and K., he was entitled to call upon the defendants to enable him to meet their share of the liability;

(2) that it was open to any creditor of the partnership to sue the partners and obtain a decree for the recovery of his debt, but no creditor, after the appointment of a Receiver, could execute any decree, obtained after that appointment, to the prejudice of the other creditors of the partnership. To obtain satisfaction of his decree the creditor was bound to go to the Court which had appointed the Receiver and take its directions;

(3) that the plaintiff's right to recover the amount he claims from the defendants depended, firstly, upon the result of the accounts as between him and the defendants as partners, directed to be taken in the decree which declared the partnership dissolved and appointed a Receiver; and, secondly, upon whether J. could, under that decree and upon the accounts consequent upon it, claim more than a rateable share of his money advanced to the partnership, as against the other creditors, if any, of the partnership.

SHIDLINGAPPA v. SHANKARAPPA ... (1903) 28 Bom. 176